

A
MANUAL OF PRACTICE
OF THE ¹⁷
4838
HIGH COURT OF JUSTICE
FOR ONTARIO,
UNDER
THE ONTARIO JUDICATURE ACT, 1881,
WITH
THE ADDITIONAL RULES
OF
THE SUPREME COURT OF JUDICATURE FOR ONTARIO,
Passed since the 21st August, 1881,
AND
THE RULES OF THE HIGH COURT OF JUSTICE.

BY
GEORGE SMITH HOLMESTED,
(REGISTRAR OF THE CHANCERY DIVISION.)

TORONTO :
ROWSELL & HUTCHISON.
1881.

1A 2882

Entered according to the Act of the Parliament of Canada, in the
year of our Lord one thousand eight hundred and eighty-one, by
GEORGE SMITH HOLMESTED, in the Office of the Minister of
Agriculture.

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ROWSELL AND HUTCHISON,
KING STREET, TORONTO,
PRINTERS AND BOOKBINDERS.

PREFACE.

On the 21st August last, a complete revolution was effected in the procedure in civil proceedings in Ontario by the coming into force of the *Ontario Judicature Act*, 1881.

Changes in procedure, however desirable on their merits, are at all times open to the objection, that they inevitably tend to create difficulties, and uncertainty, in the conduct of causes, and some time must necessarily elapse, before any new system can be thoroughly mastered by those who have to carry it into operation. The attempt to mould the new system of procedure into a book of practice may appear to be premature, and it must be admitted that any such attempt must necessarily have, at present, in many respects, a tentative character.

To those, however, who have neither the time, nor inclination, to make an analytical study of the *Act* and *Rules*, with a view to informing themselves of their precise bearing upon the different stages of an action, it is thought the following pages (in spite of whatever defects may be found therein), may be of some service, as the author has endeavoured to focus the several portions of the *Act* and *Rules* applicable to each particular step of the proceedings, and thereby save the practitioner the labour of an independent search, at each time he wishes to take a step in a cause.

No attempt has been made to treat of proceedings in the Master's Office, for two reasons,—the first, being that no appreciable change has been made in the former practice in Chancery as to such proceedings; and the second, that to have done so, would have materially increased the bulk, and the cost, of the book, and besides have delayed its publication.

In conclusion, the author desires to acknowledge the great assistance he has received in the preparation of this work, from the valuable annotations of Mr. Maclellan, Q.C., upon the *Judicature Act* and *Rules*.

OSGOODE HALL, 29th September, 1881.

TABLE OF CONTENTS.

	PAGE
TABLE OF CASES CITED	xi
JUDICATURE ACT CITED	xv
RULES OF SUPREME COURT CITED	xv
CONSOLIDATED GENERAL ORDERS OF THE COURT OF CHANCERY CITED	xviii
ADDENDA	xix

CHAPTER I.

THE COURT	1-7
1. The Supreme Court and its Divisions	1
2. Jurisdiction of the Court of Appeal	2
3. Cases appealable to the Court of Appeal	3
4. Jurisdiction of the High Court	5
5. Judicial business of the High Court	6
6. Business to be transacted before Divisional Courts	6

CHAPTER II.

OFFICERS OF THE COURT	8-23
1. Officers of the Supreme Court at Toronto	8
2. Officers of the Court of Appeal	10
3. Officers attached to the different Divisions of the High Court of Justice in Toronto.	10
4. Officers of the High Court in Toronto whose duties extend to actions in all Divisions	12
5. Local Officers of the Supreme Court	14
6. Local Officers of the High Court	14
7. Names of Officers at Toronto	18
8. Names of Local Officers	20
9. Books to be kept by Officers	22

CHAPTER III.

PARTIES TO ACTIONS—CAUSES OF ACTION	24-40
1. Parties to Actions	24
(a) Plaintiffs	25
(b) Defendants	33
2. Joinder of causes of Action	37

CHAPTER IV.

THE WRIT OF SUMMONS	41-51
1. Actions to be commenced by writ of Summons	41
2. Place of Issue of Writ	43
3. By whom to be issued	43

	PAGE
THE WRIT OF SUMMONS—(Continued.)	
4. How issued	44
5. Form of Writ	44
6. Time to be limited in the writ, for appearance thereto	44
7. Date, and teste, of writ	45
8. Indorsement of writs of summons	45
9. Issue of the writ	48
10. Certificate of <i>lis pendens</i>	49
11. Concurrent writs	49
12. Duration, and renewal, of writs	50
13. Amendment of writs	51
14. Setting aside writs	51
CHAPTER V.	
SERVICE OF WRIT OF SUMMONS	52-57
1. Service on Solicitor	52
2. Personal Service	53
3. Substituted Service	54
4. Service on Particular Defendants	54
Married Women	54
Infants	54
Lunatics	55
Partners	55
Corporations Aggregate	56
5. Service out of the Jurisdiction	56
6. Indorsement on writ of Date of Service	57
7. Affidavit of Service	57
CHAPTER VI.	
APPEARANCE	58-62
CHAPTER VII.	
PROCEEDINGS IN DEFAULT OF APPEARANCE	63-77
1. Appointment of Guardian <i>ad litem</i>	63
2. Allowance of service of writ, when served out of jurisdiction	65
3. Judgment in default of appearance	67
I. Actions formerly cognizable at law	68
(a) Final judgment in default of appearance	69
(b) Interlocutory Judgment in default of appearance	72
II. Actions formerly within the exclusive jurisdiction of Chancery	73
(a) Actions for foreclosure, sale or redemption	73
(b) Actions for administration or partition	75
(c) Actions for an account	76
(d) Cases in which motion for judgment must be made	76
CHAPTER VIII.	
PROCEEDINGS AFTER APPEARANCE	78-82
1. When writ specially indorsed	78
2. In actions for an account	81
3. In actions for foreclosure, or sale	81
4. Other actions	81

CHAPTER IX.

PLEADINGS..... 83-111

1. Nature of Pleadings in an Action..... 83
2. Rules of Pleading..... 84
 - (a) Rules applicable to all Pleadings..... 84
 - (b) " " Statement of Claim..... 87
 - (c) " " Statement of Defence, and Subsequent Pleadings..... 88
3. Filing, and Service, of Pleadings..... 92
4. The Statement of Claim..... 93
 - (a) Form of Statement of Claim..... 94
5. Defence, how made..... 95
 - (a) Statement of Defence, and Counter-Claim..... 96
 - (b) Dispute Note..... 100
 - (c) Notice to Third Party, liable to defendant for contribution, &c..... 101
6. Proceedings after Delivery of Statement of Defence..... 103
 - (a) Cases in which Judgment may be obtained on *Præcipe*..... 103
 - (b) Motion for Judgment..... 105
 - (c) Discontinuance..... 105
 - (d) Confession of Defence..... 105
 - (e) Reply..... 105
7. Reply by Third Party..... 107
8. Demurrer..... 107

CHAPTER X.

PROCEEDINGS IN DEFAULT OF PLEADING..... 112-116

1. By plaintiff..... 112
 - (a) Cases in which final Judgment may be obtained..... 112
 - (b) Interlocutory Judgment..... 114
 - (c) Cases where motion for Judgment necessary..... 115
2. By defendants..... 115
3. By, or against, Third Parties..... 115

CHAPTER XI.

PROCEEDINGS AFTER THE CLOSE OF THE PLEADINGS, TO OBTAIN JUDGMENT..... 118-137

1. Modes of trial of actions..... 118
2. Trials before a Judge, with, or without, a jury..... 119
3. Motions for New Trial..... 126
 - (a) When action tried by a Judge alone..... 126
 - (b) When action tried by a jury..... 126
 - (c) Motions to set aside judgment..... 129
4. Motions for Judgment..... 129
 - (a) Special Cases..... 133
5. Trials before Referees and Arbitrators..... 135

CHAPTER XII.

PROCEEDINGS AFTER TRIAL, OR HEARING, OF ACTION..... 138-143

- Entry of Judgment..... 138

CHAPTER XIII.

EXECUTION—EXAMINATION OF JUDGMENT DEBTOR—ATTACHMENT OF DEBTS 144-160

1. Execution	144
(a) When, and how, issued	145
(b) Indorsements on Writs	146
(c) Duration and Renewal of Writs	147
(d) Execution in particular cases	148
(e) When Leave to Issue Execution necessary	151
2. Examination of Judgment Debtors	151
3. Attachment of Debts	155
(a) Debts, Attachable	155
(b) Debts not Attachable	157
(c) Effect of Attaching Order	158
(d) Application to Pay Over	159
(e) Payment by Garnishee	160

CHAPTER XIV.

EVIDENCE..... 161-172

1. Evidence at the trial, or on motion for judgment	161
(a) Evidence at the trial	161
(b) Evidence of particular witnesses may, by leave, be taken before an Examiner	162
(c) Evidence by affidavit, where admissible without consent or leave, on motion for Judgment	162
(d) Evidence may be given by affidavit at the trial, or on motion for Judgment, by consent	162
(e) Evidence of witnesses out of the jurisdiction, how obtained	164
(f) Admissions	169
(g) Production of Documents	169
2. Evidence on Motions	170
3. Affidavits	170

CHAPTER XV.

COSTS 173-198

1. Principles on which costs awarded	173
2. Taxation of costs	176
3. Set-off of costs	180
(a) Revision of Taxation	181
(b) Review of Taxation	183
5. Taxation between solicitor and client	185
6. Tariff of costs	187
(a) Disbursements	187
(b) Fees payable to Solicitors	188

CHAPTER XVI.

MOTIONS IN COURT, AND IN CHAMBERS 199-219

1. Motions to the Court	200
(a) How made	200
(b) Leave to move	201
(c) Notice of Motion	202

TABLE OF CONTENTS.

ix

PAGE		PAGE
	MOTIONS IN COURT, AND IN CHAMBERS—(Continued.)	
44-160	(d) Evidence on Motions	203
144	(e) Hearing of Motions	206
145	(f) Motions in Particular Cases	207
146	2. Motions in Chambers	209
147	(a) Matters excluded from the Jurisdiction of the Master	
148	in Chambers	210
151	(b) Motions in Chambers, how made	212
151	(c) Applications in Chambers, to County Court Judges,	
155	and Local Masters	213
155	(d) Matters excluded from the jurisdiction of County	
157	Court Judges, and Local Masters	214
158	(e) Applications in Chambers to County Court Judges and	
159	Local Masters, how made	214
160	3. Motions in Chambers may be adjourned before a Judge	215
61-172	4. Actions for Administration, or Partition, which may be com-	
161	menced by Motion in Chambers	215
161	(a) Administration	215
162	(b) Partition, or Sale	217
162	5. Appeals from Chambers	218
162	6. Appeals from Local Masters	219
162		
162	CHAPTER XVII.	
162	PROCEEDINGS TO OBTAIN DISCLOSURE OF RESIDENCE, &C., OF PLAIN-	
162	TIFF—AND NAMES OF PARTNERS	220-221
162	1. Proceedings to obtain Disclosure of residence, and occupation	
164	of plaintiff	220
169	2. Proceedings to obtain Disclosure of names of Partners suing,	
169	or sued, in the name of a Firm	221
170		
170	CHAPTER XVIII.	
173-198	SECURITY FOR COSTS	222-227
173	1. When Order for security may be obtained on Præcipe	222
176	(a) Order on Præcipe, how obtained	223
180	2. Special Application for security for Costs	223
181	3. Security, how given	226
183		
185	CHAPTER XIX.	
187	DISCOVERY.	
187	EXAMINATION OF PARTIES—PRODUCTION OF DOCUMENTS	228-246
188	1. Examination of Parties for Discovery	228
99-219	(a) In the Chancery Division	229
200	(b) By Plaintiff	230
200	(c) By Defendant	231
201	(d) The Examination	232
202	2. Examination for Discovery, in the Queen's Bench, and Com-	
	mon Pleas, Divisions	233
	(e) When it may be had	234
	(f) How obtained	234
	3. Costs of Examination for Discovery	236
	4. Examination may be used in Evidence	236
	5. Production of Documents	236

	PAGE
EXAMINATION OF PARTIES.—PRODUCTION OF DOCUMENTS—(<i>Continued.</i>)	
(a) Production under Order, of course	237
(b) When Order obtainable	238
(c) Affidavit on Production	238
(d) Documents to be produced	239
(e) Documents which need not be produced	240
(f) Cross-examination	242
(g) Consequence of non-production	242
6. Production under Special Order	243
7. Production on Notice	244

CHAPTER XX.

AMENDMENT OF WRITS, PLEADINGS AND OTHER PROCEEDINGS.. 247-253

1. Amendment of Proceedings generally, under order	247
(a) Amendment of Writ of Summons, and Indorsement ..	248
(b) Amendment of Pleadings under order	248
(c) Adding, or striking out, Parties	248
2. Amendment of Pleadings, by Consent	250
3. Amendment of Pleadings, without Leave	250
4. Amendments, how made	251
5. Amendment of Judgments, and Orders	252

CHAPTER XXI.

PROCEEDINGS CONSEQUENT UPON MARRIAGE, DEATH, OR TRANSMISSION OF INTEREST, OF PARTIES TO ACTIONS

1. Proceedings necessary upon Marriage, Death, or transmission of Interest	254
(a) Marriage of Female party	255
(b) Death of parties	256
(c) Bankruptcy of parties	257
(d) Assignment pendente lite	257
2. Who may obtain Order to continue Proceedings	259
(a) How Order obtained	260
(b) Service of Order	261
3. Discharging Order	262

CHAPTER XXII.

PAYMENT OF MONEY INTO, OR OUT OF, COURT..... 264-265

CHAPTER XXIII.

TRANSFER, AND CONSOLIDATION, OF ACTIONS

CHAPTER XXIV.

MISCELLANEOUS

1. Computation of time	268
2. Pending Business	269
3. Procedure in County Courts	271

APPENDIX

A.

B.

	PAGE
Brown v. Blackwell	91
Brown v. Sewell	184
Brouse v. Cram	176
Burchell v. Pugin	158
Builder v. Kerr	155
Burridge v. Nicholetts	90
Burton v. Roberts	156

C.

C. & L., Re	185
Cairns v. Water Commissioners of Ottawa	91
Cameron, Re	185
Cameron v. Campbell	181
Campbell v. Peden	157
Catholic Printing Co. v. Wyman	205
Cattanach v. Urquhart	61, 100
Chamberlain v. McDonald	28
Chard v. Meyers	7
Charlton v. Dickie	123
Chatfield v. Sedgwick	175
Chatterton v. Watney	156
Chichester v. Gordon	154
Child v. Stenning	33, 37, 38
Clark v. Clark	160, 217
Clarke v. Creighton	34
Clendinning v. Varcoe	205
Cleveland v. McDonald	36
Cohen v. Hall	157
Cole v. Firth	175
Collie, Re	102
Collins v. Welsh	174, 175
Colver v. Swayze	31
Commercial Bank v. Jarvis	155, 157
Commissioners of Sewers v. Gellatly	32
Cooper v. Ewart	187
Cooper v. Brayne	158
Cotton v. Vansittart	158
Cowan, Re	156
Cox v. Barker	38
Green v. Wright	128, 174
Crump v. Cavendish	79

D.		H.	
	PAGE		PAGE
Dale v. Coon	90, 91	Hall v. Pritchett	155, 157
Daniel v. McCarthy	156	Hamilton v. Clarke	174
Darling v. Darling	167	Hamilton v. Johnson	128
Darling v. Wilson	176	Handcock v. Bethune	174
Daubeny v. Shuttleworth	203	Harding v. Barratt	159
Davidson v. McKillop	131	Hare v. Hare	134
Davies v. Felix	129	Hargrave v. Scott	184
Davis v. Jones	128	Harris v. Gamble	98
Day v. Radcliffe	38	Harris v. Meyers	150
Dear v. Sworder	98	Harrison v. McGlashan	217
DeBritto v. Hillel	205	Harvey v. Boomer	30
DeHart v. Stevenson	31	Hawkesly v. Bradshaw	99
DelaPreuve v. DucdeBiron	224	Hirsch v. Coates	158
Desilla v. Schunch	38	Hobbs v. Scott	154
Deykin v. Coleman	203	Hodgins v. McNeil	175
Doyle v. Kaufman	50	Holloway v. York	87
Dresser v. Johns	157	Honduras R. W. Co. v. Tucker	33, 37
Drewry v. O'Neill	39	Horwell v. London Omnibus Co	103
Duckett v. Gover	110	Houlding v. Poule	26
Dymond v. Croft	57	Howell v. West	37
		Huggons v. Tweed	98
E.		J.	
Eadie v. McEwen	143	Jackson v. Mawby	150
Eastman v. Eastman	30	James v. Crow	123
Edwards v. Hodges	90	Jesse v. Bennett	26
Eldridge v. Burgess	123	Jessup v. McLean	30
Evans v. Evans	155	Johnson v. Diamond	157
		Johnson v. Palmer	51
		Jones, Re—Eyre v. Cox	50
		Jones v. James	187
		Jones v. Thompson	157
F.		K.	
Falls v. Lewis	174	Keim v. Yeagley	182
Felan v. McGill	205	King v. Connor	176
Ferguson v. Carman	160	Kirkpatrick v. Howell	74
Field v. Great Northern R. W. Co. ..	174	Knatchbull v. Fowler	163
Finlayson v. Mullard	176	Kræmer v. Glass	29
Foster, Re	205		
Fraser v. Phoenix Mutual Life Ins. Co	25		
Friendly v. Carter	118		
Fritz v. Hobson	143		
Furness v. Mitchell	29		
G.		L.	
Garnett v. Bradley	173	Lapp v. Lapp	143
Gibson v. Toronto Roads Co	122	Large v. Large	51
Ginty v. Rich	155	Lawson v. Laidlaw	28, 34
Glassop v. Heston Local Board	163	Leathley v. McAndrew	31
Grant v. McDonell	158	Ledgerwood v. Ledgerwood	217
Griswold v. Buffalo, B. & G. R. W.		Lemon v. Lemon	154
Co	158	Lewes, Earl of, v. Barnett	150
Gwynne v. Rees	157	Light v. Light	31
		Lockhart v. Gray	156
		Lumsden v. Davis	118

S.	PAGE	U.	PAGE
Siddons v. Lawrence	174	U. E. & I. Ins. Co., In re—Ex. p.	
Slater v. Slater	216	Hawkins	157
Slater v. The Canada Central R. W.			
Co	87		
Sloman v. Governor of New Zealand	54	V.	
Solomon v. Donovan	156	VanNatter v. The Buffalo and Lake	
Smart and Miller, Re.....156,	158	Huron R. W. Co.....	90
Smith, Re.....	187	Vanwinkle v. Chaplin	30
Sparrow v. Hill	175	Vars v. Gould	224
Springer v. Clarke	176	Vivian v. Westbrooke	26, 216
Stewart v. Gladstone.....	165		
Street v. Grover	99	W.	
Summers v. Morphew	156	Warner v. Mosses	363
Swan v. Adams	224	Warner v. Twining.....	98
Swansea Shipping Co. v. Duncan ..	102	Watkins v. Hawkins.....	87
Sykes v. Brockville and Ottawa R.		Watson v. Cave	32
W. Co	160	Webb v. McArthur	181
		Wheeler v. LeMarchant	241
T.		White v. White	49
Tapp v. Jones	155, 159	Wilson v. Church	32
Taylor v. Pedé	35	Wilson v. Dundas	156, 158
Thompson v. Callaghan.....	224	Wilson v. Wilson	223
Thompson v. Dodd.....	143	Wise v. Birkenshaw	158, 159
Thurgood, Re	185	Wise v. Hewson.....	174
Tilbury v. Brown	160	Wolverhampton and Staffordshire	
Trail v. Porter.....	50	Banking Co. v. Bond.....	54
Treleaven v. Bray.....	98, 102	Wood v. Dunn	160
Trust and Loan Co. v. Osborne	40	Wright v. Morgan	61, 100
Turner, Ex. p	156	Wye Valley R. W. Co. v. Hawes	102, 103
Turner v. Heyland.....	175		
Tyne Alkali Co. v. Lawson	174	Y.	
		Yorkshire Banking Co. v. Beatson..	80

JUDICATURE ACT CITED.

	PAGE.
s. 3—2.	
s. 5—48.	
s. 8—48, 146.	
s. 9—5, 49.	
s. 10—92.	
s. 12—5, 30, 35, 48, 72, 110, 111, 113, 115, 119, 148, 129, 206.	
s. 13—3.	
s. 14—3.	
s. 16—98, 231.	
s. 17—5, 207.	
s. 25—127.	

	PAGE.
s. 28—6, 122, 128.	
s. 29—6.	
s. 32—4.	
s. 33—4.	
s. 34—4.	
s. 35—4, 7.	
s. 36—4, 7.	
s. 37—3, 4, 126, 129.	
s. 39—128.	
s. 44—122.	
s. 45—117, 121.	
s. 46—120.	
s. 47—13.	
s. 48—14, 136.	

	PAGE.
s. 49—136.	
s. 50—136.	
s. 51—49, 59, 73, 146.	
s. 58—9, 13, 14.	
s. 62—11.	
s. 63—10, 12, 13, 15.	
s. 64—14, 16.	
s. 66—12.	
s. 68—13.	
s. 73—1, 7, 2.	
s. 74—9.	
s. 76—15.	
s. 83—120.	
s. 91—222, 109.	

RULES OF SUPREME COURT CITED.

RULE.	PAGE.
1—32.	
2—32.	
3—32, 42, 76, 215, 216, 218, 239.	
4—32, 42.	
5—32, 42, 45.	
6—178.	
8—56.	
9—44, 45, 146.	
10—51, 248.	
11—46, 51, 248.	
12—46.	
13—31, 47.	
14—46, 69.	
15—47.	
16—76.	
17—45.	
18—47.	
19—47, 92, 97.	
20—43.	
21—43, 48, 146.	
23—44.	
24—146.	
25—48.	
26—22, 48.	
27—50.	
28—50.	
29—220.	
30—221.	

RULE.	PAGE.
31—50.	
32—	
33—52.	
34—53, 54.	
35—54.	
36—55.	
37—55, 64.	
38—55.	
39—35, 55, 63.	
40—55.	
41—17, 56.	
42—56.	
43—56.	
44—57, 66.	
45—66.	
46—45, 57, 62, 77, 96.	
47—45, 54.	
48—65, 70.	
49—56.	
50—58, 73, 106, 138.	
51—59.	
52—59.	
53—59, 92.	
54—59, 92, 93.	
55—58, 67.	
56—59.	
57—59.	
58—60.	
59—60.	

RULE.	PAGE.
60—53, 63.	
61—59, 62, 70.	
62—60.	
63—60.	
64—60.	
65—60, 62.	
66—61, 62.	
68—61, 95, 100.	
69—55, 64, 65.	
70—64.	
71—52, 57.	
72—69.	
73—69.	
74—71.	
75—60, 72, 145.	
76—69, 71.	
77—69, 71.	
78—17, 18, 74, 75, 104, 113, 138.	
79—114, 138.	
80—78.	
81—78.	
82—79.	
83—79.	
84—80.	
85—80.	
86—76.	
87—76.	
88—215.	

RULE.	PAGE.
89-25,	267.
90-249.	
91-33.	
92-33.	
93-33.	
94-25, 33.	
95-25, 36.	
96-27, 251.	
97-27, 34.	
98-31.	
100-32, 35, 36, 221.	
101-35.	
102-25, 26.	
103-24, 25, 248, 249.	
104-248.	
105-249.	
106-249.	
107-101, 102.	
108-102, 230, 231.	
109-101.	
110-103.	
111-102, 103.	
112-102, 103.	
115-37, 38.	
116-39.	
117-39.	
118-38.	
119-38, 40.	
120-38.	
121-38.	
122-39.	
123-39.	
124-31.	
126-81, 94.	
127-58, 97, 98.	
128-85, 94.	
129-84.	
130-84.	
131-70, 77, 81, 92, 93, 94, 96, 108, 203.	
132-84.	
133-87, 89.	
134-88, 89.	
135-85.	
136-85.	
137-86.	
138-86.	
139-85.	
140-86, 88.	
141-86, 88.	
142-89.	
143-88, 89.	
144-90.	
145-90.	
146-88.	
147-85, 89.	
148-88.	
149-83, 106.	
150-61, 62, 81, 92, 93, 96, 108.	

RULE.	PAGE.
151-91.	
152-106, 250.	
153-91, 251.	
154-106.	
155-91, 107, 251.	
156-249.	
157-91, 105.	
158-56, 77, 81, 82, 83, 93, 95, 179.	
159-48, 94.	
160-77, 96.	
161-96.	
162-80, 96.	
163-88, 116.	
164-99.	
165-99, 231.	
166-99.	
167-99.	
168-98.	
169-97.	
170-99, 100, 105, 120, 123, 124.	
171-124.	
172-105.	
173-106.	
174-84, 108.	
175-107.	
176-87.	
177-86.	
178-248, 249.	
179-250, 251, 252.	
180-250, 251, 252.	
181-252.	
182-251.	
183-250, 251, 252.	
184-249.	
185-249.	
186-252.	
187-252.	
188-252.	
189-107.	
190-108.	
191-108.	
192-107.	
193-108.	
194-108.	
195-109, 110, 111.	
196-110, 250.	
197-109.	
198-109.	
199-110.	
200-110.	
201-110.	
202-108.	
203-82, 115.	
204-112.	
205-112.	
206-114.	
207-114.	
208-112.	

RULE.	PAGE.
209-113.	
210-113.	
211-115.	
212-115.	
213-116.	
214-116.	
215-99, 264, 265.	
216-99.	
217-99, 265.	
218-99.	
219-232.	
220-179, 236, 246.	
221-243.	
222-237, 238.	
223-231.	
224-231.	
225-238.	
226-242.	
227-230, 231.	
229-244.	
230-179, 246.	
232-245.	
233-244, 245.	
234-245.	
235-245.	
236-233, 242.	
237-238, 242.	
238-242.	
239-236.	
240-88.	
241-169.	
243-169.	
244-207.	
245-136, 137.	
246-137.	
247-135, 136, 137.	
248-133, 134.	
249-134.	
250-134, 135.	
251-134.	
252-134.	
253-134.	
254-43, 87, 94.	
255-115, 118.	
256-117.	
259-118.	
260-119.	
261-119.	
262-120.	
264-120.	
265-119.	
266-119.	
267-120.	
268-122.	
269-123.	
270-123.	
271-122.	
272-124.	
273-122, 125.	
274-23, 124.	

RULE.	PAGE.	RULE.	PAGE.	RULE.	PAGE.
275-124, 125.		338-143, 252.		399-202, 207, 208.	
276-137.		339-148.		400-208.	
278-137.		340-148.		401-207.	
279-137.		341-148.		402-209.	
280-137.		342-149.		404-201, 212.	
281-137.		343-149.		405-201, 212.	
282-120, 121, 161, 162.		344-145, 147.		406-201, 131.	
283-162, 170, 203, 204.		345-150.		407-131, 201, 202, 212,	
284-170.		346-151.		263.	
285-162, 168, 205, 206.		347-48, 146, 150.		408-206.	
286-165.		348-146.		409-207.	
287-165.		349-146.		410-202.	
288-122, 126.		350-147.		411-201, 202.	
289-166.		351-147.		412-183, 212.	
290-167.		352-145.		413-213.	
291-165, 166.		353-147, 148.		414-218.	
292-167.		355-145.		416-11, 126, 139.	
294-166.		356-145, 151, 254.		417-16, 17, 177.	
295-168.		357-152.		418-18, 75, 114.	
296-168.		358-145.		419-22, 141, 146.	
297-168.		359-148.		420-8, 213.	
298-167.		360-148, 149.		421-8, 14, 15.	
299-166.		361-144.		422-15, 51, 65, 214.	
300-166.		362-148.		423-15, 214.	
301-162, 163.		363-148.		424-211.	
302-163.		364-150, 243.		425-63, 78, 214, 215.	
303-163.		365-150, 243.		426-215.	
304-164, 170.		366-152, 153.		427-218, 219.	
305-164.		367-152, 153.		428-125, 128, 174.	
306-130, 164.		368-152, 153, 154.		429-225.	
307-127.		369-152, 153.		430-225, 226.	
308-126, 127, 201.		370-155.		431-222, 223.	
309-126, 138, 201.		371-158.		432-119, 187.	
310-127, 201.		372-159, 160.		433-180.	
311-128.		373-159.		434-178.	
312-128.		374-159.		435-178.	
313-127.		375-159.		436-181.	
314-128.		376-160.		437-178.	
315-76, 77, 129.		378-155.		438-139, 177.	
316-129.		379-148.		439-9, 177, 182, 183.	
317-7, 126, 129.		380-149.		440-177.	
318-130, 140.		381-149.		441-180.	
319-131, 132.		382-149.		442-180.	
320-132.		383-255, 258.		443-187.	
321-128, 132.		384-255.		444-185, 186.	
322-130, 132, 162.		385-260.		445-177.	
323-131.		386-261.		447-184.	
324-131, 132.		387-261, 262.		448-184.	
325-22, 73, 75.		388-261.		449-184.	
326-142.		389-261.		450-184.	
327-142.		390-262.		452-84.	
328-73.		391-262.		453-170.	
329-125.		392-266.		454-50, 268.	
330-124.		393-267.		455-201, 203, 212, 268.	
331-143.		394-266.		456-268.	
332-138, 143.		395-267.		457-269.	
333-143.		396-208.		458-249, 250, 251, 252.	
334-143.		397-208.		459-92.	
336-138, 143.		398-208.		460-92, 249, 250, 252.	

RULE.	PAGE.	RULE.	PAGE.	RULE.	PAGE.
461—251.		469—171.		481—6.	
462—163, 202, 263, 269.		470—172, 204.		482—6.	
463—180.		471—7.		483—6.	
464—170.		474—248, 249.		489—271.	
465—171.		475—9, 13.		490—271.	
466—171.		477—265.		493—271.	
467—171.		478—265.		494—271.	
468—171.		480—6, 127.			

CONSOLIDATED GENERAL ORDERS OF THE COURT OF CHANCERY CITED.

CHV. O.	PAGE.	CHV. O.	PAGE.	CHV. O.	PAGE.
10-13—126, 139.		268—204.		472—25, 216.	
23-30—11.		269—205.		518—34, 35.	
35—17.		270—130.		526—65.	
37—17.		288—150.		552—216.	
38—17, 18.		289-290—149.		560—211, 213.	
58—25, 26.		310-313—182.		593—133, 135, 263.	
63—230.		336—253.		594—18.	
64—231.		337-351—254.		613—35.	
104—35.		418—563.		625—13.	
123—88.		427—36.		638—42, 216.	
138—229, 230.		434—104, 114.		639—42.	
139—230.		438—37.		640-641—42, 76, 217.	
140—231.		439-440—36.		642—218, 219.	
144—233.		441-454—143.		646—74.	
240—229.		456—75.		647—17.	
261—203, 204.		467—42, 75.		648—17.	
262—201.		468—42, 216.		650—18, 75.	
266—205, 206.		469-473—42.		651—18.	
267—206.		471—216.			

NOTE.

In this work, *The Ontario Judicature Act, 1881*, is cited as *J. A.*

The Rules of the Supreme Court of Judicature for Ontario are cited as *Rule* —, with the appropriate marginal number.

The Forms in the Appendices to those Rules are referred to as *Form No.* —, with the appropriate number.

ADDENDA ET CORRIGENDA.

PAGE 20. —Column 4, strike out the name of W. H. Fuller, who has died, and insert in lieu thereof "John Fraser."

" 25.—10th line, after "*Rule* 89," add "and see *Rule* 94."

" 33.—13th line, after "*(Rule* 91)," add "see *Rule* 94."

" 60.—19th line, after "tenant" add "*(Rule* 62.)"

" 65.—3rd line, after "defendant," add "or where the infant is resident out of Ontario, see *ante* p. 55."

" 66.—13th line from bottom, after "Ontario," add "Where a tort is committed without the jurisdiction, and damage results therefrom within, no action can be brought therefor against an absent defendant. (*Bree v. Marescaux*, 44 L. T. 644; affirmed in appeal, *Ib.* 765.)"

" 69.—14th line from bottom, after "costs," add "*(Rule* 72.)"

" 75.—24th line, after "Chancery," add "under *Chy. O.* 456."

" 122.—4th line from bottom, for "*Rule* 288," read "*(Rule* 268.)"

" 126.—17th line, for "37 L. J.," read "37 L. T."

—24th line, for "*Hendersoa*," read "*Henderson*,"

" 127.—15th line, after "*J. A.*, s. 25," add "*Rule* 207."

" 148.—10th line, for "filling," read "filing."

" 167.—4th line, after "cross interrogatories," add "*(Rule* 290.)"

" 170.—19th line, for "Chapter XIV.," read "Chapter XVI."

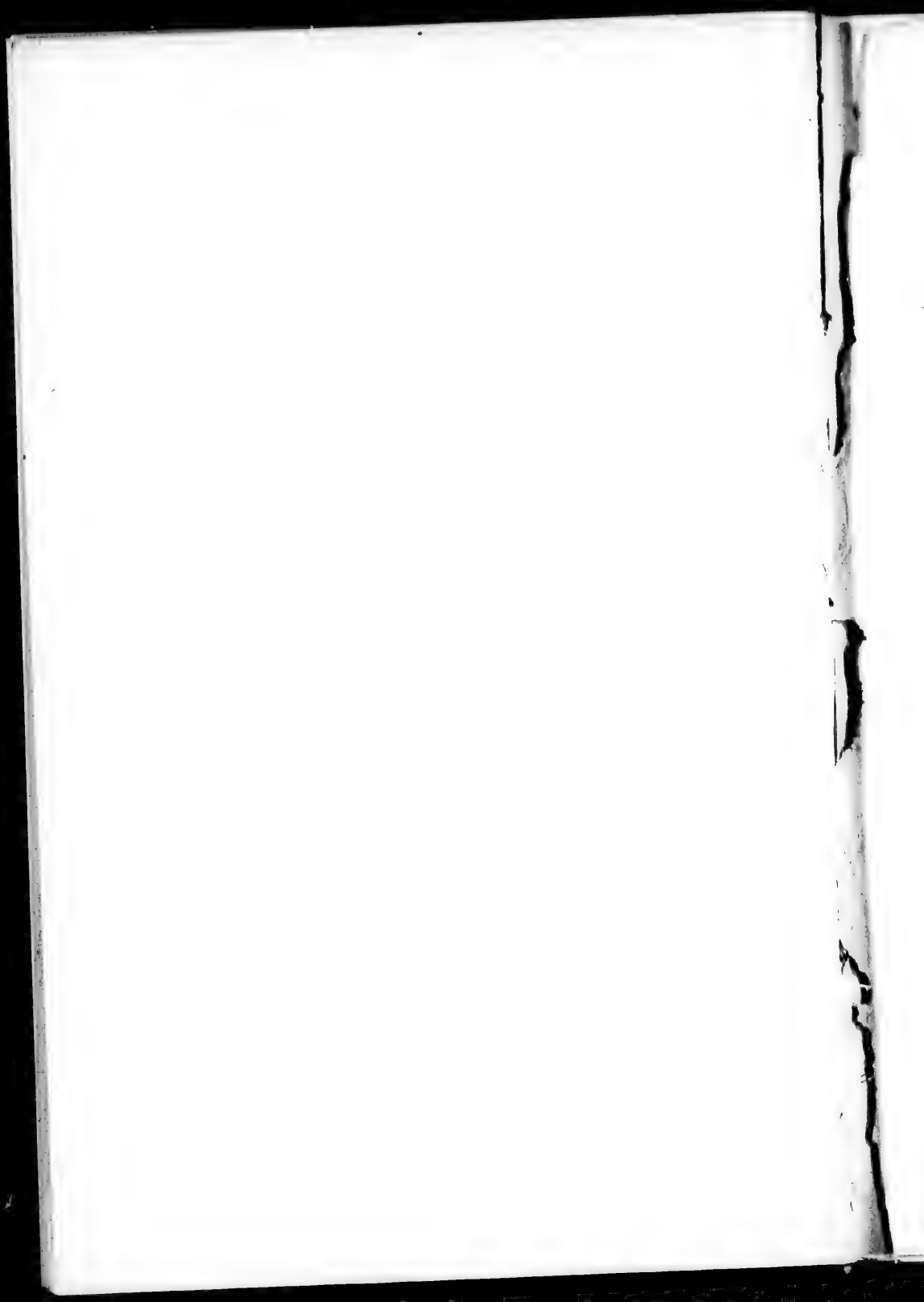
" 175.—19th line, for "*Burns*" read "*Baines*."

—19th line after "7th May, 1881, 7," add "S. C. 44 L. T. 915."

—20th line, after "May 6th, 1881, p. 6," add "S. C. 44 L. T. 146, 917."

" 241.—3th line, after "*Whisler v. LeMarchant*, *Law Times*, April, 1881, p. 425," add "S. C. 44 L. T. 632."

" 268.—21st line, for "R. S. O. c. 108," read "R. S. O. c. 1, s. 8."



A
MANUAL OF PRACTICE
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO,
UNDER
THE JUDICATURE ACT.

CHAPTER I.

THE COURT.

1. *The Supreme Court and its Divisions.*
2. *Jurisdiction of the Court of Appeal.*
3. *Cases appealable to the Court of Appeal.*
4. *Jurisdiction of the High Court.*
5. *Judicial business of the High Court.*
6. *Business to be transacted before Divisional Courts.*

1. THE SUPREME COURT AND ITS DIVISIONS.

Under *The Ontario Judicature Act* of 1881, the Superior Courts of Law and Equity in Ontario, formerly known as the Court of Appeal, and the Courts of Queen's Bench, Common Pleas, and Chancery, are consolidated into one Court styled "THE SUPREME COURT OF JUDICATURE FOR ONTARIO." This Court is divided into two permanent Divisions, styled respectively "THE COURT OF APPEAL FOR ONTARIO," and "THE HIGH COURT OF JUSTICE FOR ONTARIO."

THE COURT.

THE COURT OF APPEAL FOR ONTARIO.

This Court is composed of the Chief Justice of Ontario, and three other Judges called Justices of Appeal. The Judges of the High Court of Justice for Ontario, are also *ex officio* Judges of the Court of Appeal for the purposes mentioned in *R. S. O. c. 38, s. 10*.

THE HIGH COURT OF JUSTICE FOR ONTARIO.

This Division of the Supreme Court is divided into three Divisions, viz. :—

1. The Queen's Bench Division of the High Court of Justice for Ontario.
2. The Chancery Division of the High Court of Justice for Ontario.
3. The Common Pleas Division of the High Court of Justice for Ontario.

Each Division of this Court is presided over by a Chief Judge who, while retaining his former title, *e.g.*, Chief Justice of the Queen's Bench, The Chancellor of Ontario, The Chief Justice of the Common Pleas, (*J. A. s. 3, sub-s. 4*), is also styled the President of the Division. The senior Judge of these three, for the time being, is also President of the High Court, and in his name all writs are to be tested. There are two other Judges in each Division who are called Justices of the High Court.*

2. JURISDICTION OF THE COURT OF APPEAL.

The Court of Appeal is a Superior Court of Record, and continues to have all the jurisdiction which the Court of Appeal had before the Act (see *R. S. O. c. 38*), save as varied by or under the Act, and in civil cases it also has jurisdiction and power to hear and determine appeals

* The Puisne Judges of the Court of Chancery were formerly called "Vice-Chancellors," but this title is now abolished. (*J. A. s. 3, sub-s. 3.*)

from any judgment or order (with certain exceptions mentioned in the Act) of the High Court of Justice, or of any Judges, or Judge, thereof. (*J. A. s. 13. See R. S. O. c. 38.*) The Court of Appeal may also exercise all the power, authority, and jurisdiction of the High Court for all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution, and enforcement of any judgment or order made on such appeal, and for the purpose of every other authority given to the Court of Appeal by the Act. (*J. A. s. 14.*)

It would therefore seem that the orders and judgments of the Court of Appeal can now, when necessary, be enforced by process to be issued out of that Court, and that it is not necessary to remit an action to that Division of the High Court, from which the appeal shall have been brought, except where further proceedings in the action, other than execution, are necessary to be taken. Under the former practice it was held that the certificate of the Court of Appeal might be acted on by the Court of first instance without making the certificate a rule of the latter Court. (*McArthur v. Southwold*, 8 Pr. R. 27.)

3. APPEALS TO THE COURT OF APPEAL.

The following rules regulating appeals to the Court of Appeal may be collected from the *Judicature Act and Rules* :—

1. *Appeals which can be brought without leave.*—An appeal will lie to the Court of Appeal from any order or judgment of a Judge, (*J. A. s. 37*), or Divisional Court, not made or obtained by consent, or in Chambers, *without leave* in the following cases, viz. :—

(a) Where the title to *real estate* or some interest therein is affected.

(b) Where the validity of a patent is affected.

(c) Where the matter in controversy on the appeal exceeds \$200, exclusive of costs, and the Divisional Court appealed from was *not unanimous*.

(d) Where the Divisional Court appealed from was *unanimous*, or where a Divisional Court on a motion to set aside or discharge a rule, order, or decision of a Judge does not substantially vary the rule, order, or decision moved against, but the amount in controversy on the appeal in either case exceeds \$500, exclusive of costs.

(e) Where the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature, affecting future rights. (*J. A.*, ss. 32, 33, 34, 37.)

2. *Cases in which leave to appeal is necessary.*—Leave to appeal must be obtained from the Judge, or Divisional Court, making the order appealed from, or from the Court of Appeal, in the following cases, viz.:—

(f) Where the order or judgment to be appealed from was made by consent. (*J. A.* s. 32.)

(g) Where the order was made by a Judge in Chambers, not in the exercise of his discretion. (*J. A.* s. 36.)

(h) Where the order was made as to costs only, which by law are left to the discretion of the Court, or Judge, making the order. (*J. A.* s. 32.)

(i) In all other cases not coming within clauses *a, b, c, d, and e, supra.* (*J. A.* s. 33.)

3. *Cases in which no appeal will lie to the Court of Appeal.*—No appeal at all can be had to the Court of Appeal from:—

(a) Any interlocutory order which before the passing of the Act would not have been appealable (*J. A.* s. 35); and any doubt as to what decrees, orders, or judgments are interlocutory, is to be determined by the Court of Appeal.

(b) Nor from any order made by a Judge in Chambers in the exercise of his discretion. (*J. A.* s. 36.)

4. JURISDICTION OF THE HIGH COURT.

The High Court of Justice is a Superior Court of record, and in it is vested the jurisdiction formerly exercised by the Courts of Queen's Bench, Common Pleas, and Chancery, and Courts of Assize, Oyer and Terminer and Gaol Delivery, or by any Judge of any of such Courts, in Court or in Chambers, and under statute or otherwise (*J. A. s. 9*).

Each Division of the High Court, now exercises the jurisdiction thus vested in the High Court, and neither Division has any exclusive jurisdiction in any civil proceeding whatever.

Certain rules of Equity are now made rules of Law (see *J. A. s. 17*, sub-s. 2-7), and hereafter wherever there is any conflict between the rules of the Common Law, and Equity, with reference to the same matter, the rules of equity are to prevail. (*J. A. s. 17*, sub-s. 10.)

It is, however, provided that the jurisdiction thus vested in the High Court is to be exercised, so far as regards procedure and practice, where no special provision is contained in the Act and Rules with reference thereto, as nearly as may be, in the same manner as the same might have been exercised by the respective existing Courts, if the Act had not been passed. (*J. A. s. 12*) The effect of which provision will be to continue in the Queen's Bench, and Common Pleas, Divisions, the former Common Law practice in matters of procedure unprovided for by the Act and Rules, and to continue the former practice of the Court of Chancery in like matters in the Chancery Division. This, it is to be feared, will lead to some little confusion and difficulty in practice; and it is to be regretted now that the several Divisions of the High Court have coördinate jurisdiction in all actions, that some way could not have been found of completely assimilating the practice in all the Divisions. This might have been done by providing that in matters of practice not specially provided for, the practice of the former Courts of Law should prevail, and

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where there was no practice on the point in the Courts of Law, the former practice in Chancery should be the rule or *vice versa*.

5. JUDICIAL BUSINESS OF THE HIGH COURT.

Every action and proceeding in the High Court of Justice, and all business arising out of the same is, as far as is practicable and convenient, to be heard, determined, and disposed of before a single Judge; and a Judge sitting alone constitutes the Court, and is to decide all questions coming properly before him, and is not to reserve any case or any point in a case for the consideration of a Divisional Court. (*J. A. s. 28.*) It will thus be seen that the method of disposing of business in Chancery before the Act is the system which is now introduced in all the Divisions of the High Court.

Divisional Courts for each Division, composed of two or more Judges of the respective Divisions (*J. A. s. 29.*) of the High Court are, however, to sit at stated intervals corresponding with the former Common Law Terms, though no longer called Terms, but now to be known as the Michaelmas, Hilary, and Easter, Sittings (*Rule 480*), but this regulation is not to apply to the Chancery Division unless the Judges of that Division find it necessary to hold such sittings for the due despatch of the business assigned to that Division. The Divisional Courts may also sit at any other times which may be directed by the High Court. (*Ib.*)

One or more of the Judges is also, from time to time, to be selected to take the business of the Courts during vacations. (See *Rules 481-3.*)

6. BUSINESS TO BE TRANSACTED BEFORE DIVISIONAL COURTS.

The following business is to be transacted before the Divisional Courts of the High Court, viz:—

1. Motions for new trials in jury cases.

2. Appeals from orders of a Judge in Chambers (*Rule 471*) except where made in the exercise of such discretion as by law belongs to him, (*J. A. s. 36*) or where the order is an interlocutory order from which there would have been no relief before the Act by an application to a Superior Court. (*J. A. s. 35*; and see *Chard v. Meyers*, 3 Chy. Ch. R. 120; *Scoble v. Henson*, 9 U. C. L. J. 131.)

3. Proceedings directed by any statute to be taken before the Court, and in which the decision of the Court is final. (*Rule 471*.)

4. Cases of *habeas corpus* in which a Judge directs that a rule *nisi* for the writ, or the writ, be made returnable before a Divisional Court. (*Ib.*)

5. Other cases where all parties agree that the same be heard before a Divisional Court. (*Ib.*)

6. Applications to set aside, reverse, or vary, judgments ordered to be entered by any Judge, before whom an action is tried. (*Rule 317*.)

CHAPTER II.

OFFICERS OF THE COURT.

1. *Officers of the Supreme Court, at Toronto.*
2. *Officers of the Court of Appeal.*
3. *Officers attached to the different Divisions of the High Court of Justice in Toronto.*
4. *Officers of the High Court in Toronto whose duties extend to actions in all Divisions.*
5. *Local Officers of the Supreme Court.*
6. *Local Officers of the High Court.*
7. *Names of Officers at Toronto.*
8. *Names of Local Officers.*
9. *Books to be kept by Officers.*

1. OFFICERS OF THE SUPREME COURT, AT TORONTO.

The Master in Chambers.—This is a new officer (*Rule 420*), and the duties assigned to him are those formerly discharged by the Clerk of the Crown of the Queen's Bench in Chambers, and by the Referee in Chambers of the Court of Chancery. As to the powers formerly exercised by these officers: (See *MacLennan* 57-60, *R. S. O. c. 39*, ss. 28, 29; *Rules of Q. B. of February, 1870*, 29 *U. C. Q. B.*; *R. S. O. c. 40*, s. 28, *Chy. O.* 197, 560.)

This officer is empowered by order of the Lieutenant-Governor in Council, and by *Rule 421*, to obtain the assistance of the Registrar of the Queen's Bench Division of the High Court, or of any Official Referee, to sit with, or for him.

The Master in Ordinary.—This officer who was formerly Master in Ordinary of the Court of Chancery, is now an

officer of the Supreme Court (*J. A. s. 58, sub-s. 2*), and instead of his duties being confined as formerly to business pending in the Court of Chancery, his duties are extended to all causes referred to him from any Division of the Supreme Court, or any Division of the High Court of Justice, or any Judge of a Division, or the Master in Chambers.

The Accountant.—The duties of this officer are similar to those performed by the Referee in Chambers, as acting Accountant of the Court of Chancery prior to the passing of the *Judicature Act*. The funds paid into Court in the Queen's Bench, and Common Pleas, prior to the passing of the Act, and also the funds and securities standing in the Court of Chancery, are transferred to the control of this officer. (*Rule 475.*)

The Taxing Officers.—These officers who formerly discharged the duties of Taxing Officers for the Court of Chancery, and Court of Common Pleas, respectively, are now to tax all costs required to be taxed in any Division of the Supreme Court at Toronto. The costs of proceedings in the Court of Appeal, and in each Division of the High Court of Justice, required to be taxed at Toronto, are consequently now to be taxed by one or other of these officers; it is also part of their duty to revise the taxation of costs by local officers under the provisions of *Rule 439.*

Solicitors.

All persons admitted prior to 22nd August, 1881, as Solicitors or Attorneys of, or by law empowered to practise in, the former Courts of Queen's Bench, Chancery, or Common Pleas, are to be hereafter called Solicitors of the Supreme Court of Ontario. (*See J. A. s. 74.*)

All persons hereafter entitled to be admitted as Solicitors, may be admitted by any Divisional Court of the High Court of Justice, on payment of the Fees required for

10 OFFICERS OF THE HIGH COURT, AT TORONTO.

admission in the Courts of Queen's Bench, Chancery, and Common Pleas, at the time of the passing of the Act.

2. OFFICERS OF THE COURT OF APPEAL.

The Registrar.—The duties of this officer are the same as were discharged by him prior to the *Judicature Act*, except that he is now relieved from acting as Taxing Officer.

3. OFFICERS ATTACHED TO THE DIFFERENT DIVISIONS OF THE HIGH COURT OF JUSTICE IN TORONTO.

Queen's Bench Division.

The Registrar of the Queen's Bench Division.—The duties of this officer are similar to those formerly discharged by the Clerk of the Crown and Pleas of the Court of Queen's Bench, and in addition thereto he is also liable to be called on, at the request of any Judge of the High Court of Justice, or the Master in Chambers of the Supreme Court, to sit with or for that officer. Under *J. A. s. 63* this officer is an Official Referee.

The Clerk of the Process.—The duties of this officer are similar to those performed by him prior to the passing of the *Judicature Act*. (*R. S. O. c. 39, ss. 36, 42, 43-6.*) Writs of summons, however, are now to be prepared by the Solicitor, and the duty of the Clerk of the Process is to sign, seal, and issue them for the Queen's Bench, ~~and~~ Common Pleas Divisions. His signature is no longer necessary, as formerly, to writs of summons issued by the officers of the Court out of Toronto.

Chancery Division.

The Registrar of the Chancery Division.—The duties of this officer are similar to those formerly performed by him as Registrar of the Court of Chancery. He is also the *Senior Judgment Clerk* of the High Court, and as

such it is his duty to settle the form and terms of such special judgments as may be referred to him by any Divisional Court, or a Judge of any Division, or the Master in Chambers. (*Rule 416*).

Assistant Registrar of the Chancery Division.—The duties of this officer are similar to those formerly performed by him as Assistant Registrar of the Court of Chancery. He is also the *Junior Judgment Clerk* of the High Court, and as such it is his duty to settle the form and terms of such special judgments as may be referred to him by any Divisional Court, or a Judge of any Division, or the Master in Chambers.

The Inspector of Titles.—The duties of this officer continue the same as they were prior to the passing of the *Judicature Act*. (See *Chy. O. 495, et seq.*) Under *J. A. s. 63*, this officer is an Official Referee.

The Referee of Titles at Toronto.—The duties of this officer continue the same as they were prior to the passing of the *Judicature Act*. (See *Chy. O. 492, et seq.*) Under *J. A. s. 63*, this officer is an Official Referee. The duties of the Inspector of Titles, and Referee of Titles, are not confined to applications to quiet titles in the Chancery Division, but are extended to such applications as may be referred to him from either of the other Divisions of the High Court. (*J. A. s. 62*.)

Clerk of Records and Writs.—The duties of this officer, are similar to those performed by him prior to the passing of the *Judicature Act*. (See *Chy. O. 23-30*.) It will be his duty now to ~~sign, seal, and issue writs of summons in actions instituted in the Chancery Division at Toronto, and to perform in actions in the Chancery Division the like duties as are performed by the Clerk of the Process in respect to the issue of writs for the Queen's Bench, and Common Pleas, Divisions, and also the like duties as are per-~~

formed by the Registrars of the Queen's Bench, and Common Pleas, Divisions, so far as relates to the receiving, and filing papers, and issuing orders of course, but all judgments entered at Toronto in the Chancery Division will be entered in the office of the Registrar of the Division.

Special Examiners.—These officers are appointed to take oral examinations of parties and witnesses in suits, either for discovery, or to be used on motions before the Court, or in Chambers.

Common Pleas Division.

The Registrar of the Common Pleas Division.—The duties of this officer are similar to those formerly discharged by the Clerk of the Crown and Pleas of the Court of Common Pleas, and in addition thereto he is also the Inspector of the local offices of the High Court of Justice. Under *J. A.* s. 63, this officer is an Official Referee.

Clerk of the Process.—See *ante.*—*Queen's Bench Division.*

4. OFFICERS OF THE HIGH COURT IN TORONTO WHOSE DUTIES EXTEND TO ACTIONS IN ALL DIVISIONS.

The Official Guardian.—This officer, besides acting as guardian *ad litem* of infants under rules of Court and other orders, is to perform such other duties as a Divisional Court, or Judge, may from time to time direct. (See *J. A.* s. 66.)

Senior Judgment Clerk.—*Junior Judgment Clerk.*—The duties of these officers are described under the head of *Registrar of the Chancery Division*, and *Assistant Registrar of the Chancery Division*. (See *ante* pp. 10-11.)

The Clerk of Assize.—The duties of this officer are unchanged by the *Judicature Act*. (See *R. S. O. c. 41*, s. 16; *Ib. c. 50*, s. 284.)

Official Referees.—Under the *Judicature Act*, section 63, the following officers are *ex officio* Official Referees in Toronto :—

The Master in Ordinary of the Supreme Court. (a)

The Registrar of the Queen's Bench Division. (b)

The Registrar of the Common Pleas Division. (b)

The Referee in Chambers. (c)

The Accountant. (d)

The Inspector of Titles.

The Referee of Titles.

Subject to any Rules of Court, and to such right as may exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice, or the Court of Appeal, may be referred by the Court, or by any Divisional Court, or Judge before whom such matter is pending, to an *Official Referee* for inquiry, and report (see *J. A. s. 47*), and in certain cases actions may also be referred for trial before

(a) In the 63rd section of the Act this officer is described as the Master in Chancery, his title now is Master in Ordinary of the Supreme Court. (See *J. A. s. 58*, sub-s. 2.)

(b) In the 63rd section of the Act, these officers are described as Clerks of the Crown and Pleas ; their title has since been changed by an order in Council. Whether the former Clerk of the Crown and Pleas of the Queen's Bench who is now Master in Chambers, is now an Official Referee, is doubtful.

(c) This office is now vacant, the former Referee in Chambers having been appointed Registrar of the Queen's Bench Division.

(d) It is not clear what officer is here meant. See *J. A. s. 68*, which speaks of "Accountant of the High Court," while *Rule 475* appoints an "Accountant of the Supreme Court." At the time of the passing of the Act there was no Accountant of the Court of Chancery, the Referee in Chambers having, since 26th June, 1876, discharged the duties of that office. *Chy. O. 625*.

an *Official Referee*. (See *J. A.* sec. 48.) Under *Rule 421*, any *Official Referee*, upon the request of the Master in Chambers, or of a Judge of the High Court, may sit with, or for, such Master, and while sitting for him is to have all the authority and power of such Master, but is not entitled to any fees.

5. LOCAL OFFICERS OF THE SUPREME COURT.

Local Masters.

The Masters in Chancery holding office at the following places, viz. :—

Algoma.	Guelph.	Perth.
Barrie.	Hamilton.	Peterborough.
Belleville.	Kingston.	Sandwich.
Berlin.	Lindsay.	Sarnia.
Brampton.	London.	Simcoe.
Brantford.	L'Orignal.	St. Catharines.
Brockville.	Milton.	St. Thomas.
Cayuga.	Napanee.	Stratford.
Chatham.	Ottawa.*	Walkerton.
Cobourg.	Owen Sound.	Woodstock.
Cornwall.	Picton.	Whitby.
Goderich.	Pembroke.	

are under the *Judicature Act*, made *Local Masters* of the Supreme Court. (*J. A.* s. 58, sub-s. 2.)

There being no Local Masters in Chancery at Welland and Orangeville at the time the Act came into operation, the Judges of the County Courts of Welland and Dufferin became *Local Masters* of the Supreme Court at these places. (*J. A.* s. 64, sub-s. 2.)

6. LOCAL OFFICERS OF THE HIGH COURT.

Local Judges of the High Court.

From and after the 1st January, 1882, the Judges of the County Courts (except the County Court of York) are

* At Ottawa there are two Masters having concurrent jurisdiction, viz., W. M. Matheson, Esq., and Robert Cassels, jr., Esq.

to have the same jurisdiction in actions brought in their respective counties as the *Master in Chambers*, except that their authority is not to extend to granting leave for service out of Ontario nor to allowing service of a writ of summons or notice in lieu of writ out of Ontario; nor (except by consent) to any applications required to be made on notice, in actions where the solicitors for all parties do not reside or have offices in the county town where the action is brought, or where any party suing or defending in person does not reside in or have a place of business in the county or union of counties where the action is brought; and actions in the Chancery Division are also excepted from their jurisdiction wherever there is a *Local Master* who does not practise as a barrister or solicitor, and who has not taken out a certificate to practise, and in such actions the *Local Master* is to have the jurisdiction of the *Master in Chambers*, subject to the same exceptions. (*Rules 422-3.*)

All the County Court Judges (except those of York) are, for the purpose of their jurisdiction in actions in the High Court, "*Local Judges of the High Court.*" (*J. A. sec. 76, Rules 421-3.*)

Official Referees out of Toronto.

The County Court Judges in each county are, under *J. A. s. 63*, appointed *Official Referees*. For the duties of the *Official Referees* see *ante* page 13.

Deputy Clerks of the Crown, Deputy Registrars, and Local Registrars.

There are three classes of officers to perform the ministerial duties in reference to suits instituted in the High Court out of Toronto, viz: *Deputy Clerks of the Crown, Deputy Registrars, and Local Registrars.*

Deputy Clerks of the Crown.—These are the Deputy Clerks of the Crown, at those places where there is also

a Deputy Registrar in Chancery. Their duties are confined to actions brought in the Queen's Bench, and Common Pleas, Divisions in their respective counties.

Deputy Registrars.—These are the former Deputy Registrars in Chancery at those places where there is also a Deputy Clerk of the Crown. The duties of the Deputy Registrars are confined to actions brought in the Chancery Division in their respective counties.

Local Registrars.—These are officers who combine the offices of Deputy Clerk of the Crown and Deputy Registrar. Their duties extend to all actions brought in their respective counties, whether in the Queen's Bench, Common Pleas, or Chancery Divisions. (*Rule 417.*)

Wherever at the time of the Act coming into operation, there was at any place a *Deputy Registrar in Chancery* (not being a County Court Judge) and a *Deputy Clerk of the Crown*, each of these officers was to continue to hold office, and each of them was empowered to exercise, in reference to suits coming within his jurisdiction, all the powers formerly exercised by a Deputy Registrar in Chancery, or a Deputy Clerk of the Crown. (*Rule 417.*) Whenever any vacancies hereafter occur in the offices of *Deputy Clerk of the Crown* and *Deputy Registrar*, they are to be consolidated unless the Presidents of the Divisions of the High Court or a majority of them recommend otherwise. (*J. A. s. 64, sub-s. 4.*)

The Act provides that wherever the County Court Judge is the *Local Master*, the County Court Clerk is to be the *Deputy Registrar*. (*J. A. s. 64, sub-s. 3.*)

In all places where any County Court Judge was at the time the Act came into operation, the *Local Master in Chancery*, he was also the *Deputy Registrar in Chancery*. The effect of the above provision of section 64, therefore appears to be to deprive him of the latter office and cast it on the Clerk of the County Court, which latter officer being also in all cases (except at Toronto) *ex officio* Deputy

Clerk of the Crown, the two offices of *Deputy Registrar* and *Deputy Clerk of the Crown*, became united in the same person, and under *Rule 417*, he is henceforth to be called *Local Registrar*. The County Court Judge, however, in such cases will continue to hold and exercise the office of *Special Examiner*.

Under the powers conferred on *Deputy Clerks of the Crown* by *Rule 417*, they will be authorized to enter judgments on *præcipe* in suits instituted in the Queen's Bench, and Common Pleas, Divisions, for foreclosure, sale, or redemption, of mortgaged premises, in their respective Counties, in a similar manner to which decrees were formerly granted in such cases by *Deputy Registrars* in Chancery. (See *Chy. O.* 38, 647, 648.) They may also issue in all actions brought in their respective Counties in the Queen's Bench, and Common Pleas, Divisions, all orders of course which are issuable by the Clerk of Records and Writs (*Chy. O.* 37), and perform all other duties in relation to such suits as the Clerk of Records and Writs in Chancery was accustomed formerly to perform. (*Chy. O.* 35.) *The Deputy Clerks of the Crown* are also empowered to grant orders, or judgments, for administration and partition on such evidence, if any; and in such cases, as nearly as may be, as provided by the former practice of the Court of Chancery in that behalf; but it is doubtful whether this is not a nugatory provision. Such orders were never, under the former practice in Chancery, issued on *præcipe*, as *Rule 78* seems to assume was the case, and it was never within the power of a *Deputy Registrar* in Chancery to issue such orders at all, the *Local Masters* alone had jurisdiction to entertain applications of that kind, and only upon notice, the offices of *Deputy Registrar* and *Local Master* being distinct, though generally heretofore united in the same person.

Deputy Registrars have also now the powers and duties of a *Deputy Clerk of the Crown* as to actions in the Chancery Division commenced in their respective offices. (*Rule 41.*)

All orders issued by Local Officers, to be entered at Toronto.—All orders in actions, issued by a *Deputy Registrar, Deputy Clerk of the Crown, or Local Registrar*, which require to be entered, are to be entered at Toronto. (*Rule 418.*) Whether the word "orders," in *Rule 418*, was intended to extend to all judgments is not very clear (see *Rule 78*, where judgments of foreclosure, &c., are referred to as "orders or judgments.") According to the former practice in Chancery, all decrees and orders for sale, foreclosure, redemption, administration, or partition, and all orders of revivor, were required to be entered. (*Chy. O. 38, 594, 650.*) The latter order required "all orders" made by Deputy Registrars to be entered. This probably was wider than was intended, and included orders of course which, under Chancery Order 594, need not have been entered. Order 594, however, appears to have been virtually abrogated so far as orders issued by a Deputy Registrar were concerned by Chancery Order 651, and until some new provision is made, it seems doubtful whether every judgment and order, including orders of course, issued by a *Deputy Clerk of the Crown, Deputy Registrar, or Local Registrar*, must not be entered at Toronto. This, however, will probably be corrected by some future *Rule of Court*.

Special Examiners.—These officers are empowered to take the examinations of parties or witnesses, either for the purpose of discovery, or to be used as evidence upon motions before the Court, or in Chambers. The Local Masters are also Special Examiners.

7. NAMES OF OFFICERS AT TORONTO.

Officers of the Supreme Court.

MASTER IN CHAMBERS.	R. G. Dalton, Esq., Q.C.
THE MASTER IN ORDINARY OF THE SUPREME COURT	} T. W. Taylor, Esq., Q.C.
THE ACCOUNTANT OF THE SUPREME COURT..	
THE TAXING OFFICERS	} J. H. Thom, Esq.
	} S. B. Clark, Esq.

Officers of the High Court of Justice.

THE REGISTRAR OF THE COURT OF APPEAL..	A. Grant, Esq.
THE REGISTRAR OF THE QUEEN'S BENCH	{ R. P. Stephens, Esq.
DIVISION	
THE REGISTRAR OF THE CHANCERY DIVISION..	G. S. Holmested, Esq.
THE REGISTRAR OF THE COMMON PLEAS	{ M. B. Jackson, Esq.
DIVISION	
ASSISTANT REGISTRAR OF CHANCERY DIVISION.	A. F. McLean, Esq.
CLERK OF RECORDS AND WRITS, " "	G. M. Lee, Esq.
SPECIAL EXAMINERS	{ Jno. Crickmore, Esq.
	{ Geo. M. Evans, Esq.
	{ Jno. Bruce, Esq. (a)
INSPECTOR OF TITLES, AND REFEREE OF TITLES,	{ G. S. Holmested, Esq.
AT TORONTO	
INSPECTOR OF LOCAL OFFICES	M. B. Jackson, Esq.
SENIOR JUDGMENT CLERK	G. S. Holmested, Esq.
JUNIOR " "	A. F. McLean, Esq.
ACCOUNTANT OF THE HIGH COURT	(No Officer appointed.) (b)
OFFICIAL GUARDIAN	John Hoskin, Esq, Q.C.
OFFICIAL REFEREES, <i>Ex Officio.</i>	{ The Master in Ordinary of the Supreme Court.
	{ The Registrar of The Queen's Bench Division.
	{ " " Common Pleas "
	{ The Referee in Chambers (Vacant).
	{ The Accountant.
	{ The Inspector of Titles.
	{ The Referee " "
THE CLERK OF THE PROCESS	W. M. Ross, Esq.
THE CLERK OF ASSIZE	G. B. Nichol, Esq.

(a) This officer is only empowered to take examinations in shorthand.

(b) The funds and securities in the former Courts of Queen's Bench, Chancery, and Common Pleas, have been vested in the Accountant of the Supreme Court, by order of the High Court of 25th August, 1881.

8. NAMES OF LOCAL OFFICERS.

COUNTIES.	COUNTY TOWNS.	LOCAL MASTERS.	DEPUTY CLERKS OF THE CROWN.	DEPUTY REGISTRARS.	LOCAL REGISTRARS.
Algoma District	Sault Ste. Marie.	Hon. Walter McCrea * +			T. A. P. Towers.
Brant	Brantford.	S. J. Jones * + (a)			W. B. Rubidge.
Bruce	Walkertown	W. A. McLean + (a).	Wm. Gunn.	W. A. McLean	.....
Carleton	Ottawa.	W. M. Matheson + (a) }	J. Featherstone.	W. M. Matheson	.....
		R. Cassels, jr. +			.....
Dufferin.	Orangeville.	M. M. McCarthy *			John McLaren.
Elgin	St. Thomas.	James Shanly +	David McLaws	James Shanly.	.....
Essex	Sandwich.	S. S. Macdonell + (a)	F. E. Marcon.	S. S. Macdonell.	.....
Frontenac.	Kingston.	Jas. A. Henderson + (a).	W. H. Fuller.	Jas. A. Henderson.	.....
Grey	Owen Sound	James A. Masson + (a)	George Inglis	James A. Masson	.....
Halimand.	Cayuga.	J. G. Stevenson * +			James Mitchell.
Haliburton.	(This county is annexed to Victoria for judicial purposes.)				W. L. P. Eager.
Haldon	Milton.	Thomas Miller * +			.....
Hastings	Belleville.	S. S. Lazier + (a)	A. G. Northrup.	S. S. Lazier.	.....
Huron	Goderich.	H. Macdermott + (a)	D. MacDonald.	H. Macdermott.	.....
Kent	Chatham.	R. O'Hara + (a)	W. A. Campbell.	R. O'Hara	.....
Lambton	Sarnia	C. Robinson * + (a)			Jno. R. Gemmill.
Lanark	Perth	W. S. Senkler * + (a)			Charles Rice.
Leeds and Grenville	Brockville	J. D. Buell + (o)	S. Reynolds.	J. D. Buell.	.....
Lennox and Addington	Napanee.	S. S. Lazier +	J. B. McGuin.	S. S. Lazier.	.....
Lincoln	St. Catharines.	W. F. Macdonald + (a).	F. A. B. Clench.	W. F. Macdonald.	.....
Middlesex	London	James Shanly + (a)	John McBeth.	James Shanly.	.....

Norfolk	Simcoe	C. C. Rapelje + (a)		C. C. Rapelje.
Northumberland & Durham	Cobourg	G. McK. Clark * + (a)		R. D. Chaterton.
Ontario	Whitby	Geo. H. Dartnell * + (a)		J. Barclay.
Oxford	Woodstock	H. B. Beard, Q. C., + (a)	H. B. Beard, Q. C.	J. A. Austin.
Peel	Brampton	A. F. Scott * + (a)		John McFadden.
Perth	Stratford	D. H. Lizars * + (a)		John Fraser.
Peterborough	Peterborough	C. A. Weller + (a)	C. A. Weller	A. Thompson.
Prescott and Russell	L'Orignal	James Daniell * +		
Prince Edward	Pictou	S. S. Lazier +	S. S. Lazier	
Renfrew	Pembroke	John Deacon *		
Simcoe	Barrie	J. R. Cotter + (a)	J. R. Cotter	
Stormont, Dundas, and Glengarry	Cornwall	J. F. Pringle * + (a)		R. McDonald.
Victoria	Lindsay	W. W. Dean * + (a)		W. Grace.
Waterloo	Berlin	A. Lacourse * + (a)		J. McDougall.
Welland	Welland	R. McDonald *		J. P. Wilson.
Wellington	Guelph	J. W. Hall + (a)	J. W. Hall	
Wentworth	Hamilton	M. O'Reilly, Q. C., + (a)	Miles O'Reilly, Q. C.	

* This officer is also Judge of the County Court, and *ex officio* an Official Referee under *The Judicature Act*, s. 63.

+ This officer is also a Special Examiner.

(a) This officer is also a Referee of Titles under *The Quietng Titles Act*. (See *Chg. O.* 492-516.)

N. B.—Mr. C. R. Horne is temporarily Master and Deputy Registrar at Sandwich, during the absence from the Province of Mr. S. S. Macdonell.

9. BOOKS TO BE KEPT.

The following books appear to be necessary to be kept, viz:—A Process Book, Procedure Book, Judgment Book, Judgment Docket, and Cause Book.

Process Book.—This book is to be kept by all officers whose duty it is to issue writs of summons. This book is to be kept in a similar way to which Process Books have been heretofore kept by the Deputy Clerks of the Crown. The short style of cause, the date of the writ, and the name of the solicitor are to be entered, and the Division of the High Court in which the writ issued must also appear. It will probably be found convenient for *Local Registrars* to keep two books, one for the Queen's Bench, and Common Pleas, Divisions, in which the writs must issue alternately, and another for the Chancery Division, in which writs may issue at the option of the suitor. (*Rule 26.*)

Procedure Book.—This book must be kept by all officers with whom pleadings are filed. In it, is to be entered a note of the filing of the appearance, and all subsequent proceedings in the action, to final judgment, in the manner in which such entries have been heretofore made in such books by the Deputy Clerks of the Crown. (*Rules 26 and 56.*)

Judgment Book.—This book must be kept by all officers with whom judgments are entered, and in it every judgment is required to be entered. (*Rule 325.*) It appears to be intended that the entry shall be a full and complete copy of the judgment, and all judgments, interlocutory, as well as final, must be entered therein.

Judgment Docket.—In this book is to be entered the particulars of all final judgments, as required by *R. S. O.* c. 50, s. 302. (See *Rule 419.*)

Cause Book.—The officers attending the sittings of the Court for the hearing and trial of causes, before a Judge alone, or with a jury, are to keep a book in which is

to be entered a minute of all proceedings at the trial or hearing: *e. g.*, the short style of the cause; the name or names of the Judge, or Judges, before whom the trial or hearing takes place; the date of the trial, or hearing; the names of counsel, and solicitors, who appear and for what parties they respectively appear, and of any party appearing in person; a note of the evidence adduced on either side, and also a statement of all findings as the Judge at the trial or hearing may direct to be entered, and also of all certificates, if any, granted by the Judge. The statement of the findings, and Judge's certificates, are also to be indorsed on the copy of the pleadings filed as a record. There should also be kept a minute of all applications, made at the trial, or hearing, for amendments, or otherwise, and of the result thereof. (*Rule 274.*)

CHAPTER III.

PARTIES TO ACTIONS.—CAUSES OF ACTION.

1. *Parties to Actions.*(a) *Plaintiffs.*(b) *Defendants.*2. *Joinder of causes of Action.*

1. PARTIES TO ACTIONS.

Before an action can be commenced, one of the first things to be considered is the question, who are to be named as parties to the action.

In actions which were formerly brought in the Courts of common law, there was usually little difficulty in determining who were the proper and necessary parties to be named as plaintiffs and defendants in the action; but in suits in which the Court of Chancery had formerly exclusive jurisdiction, the question of parties was often a matter of very great difficulty, and depended on a variety of considerations.

The question of parties will be still one of some difficulty, in many actions of the class which were formerly brought exclusively in Chancery.

While it would be beyond the scope of the present work, to enter into any elaborate discussion of the principles, which govern the constitution of parties to actions, it may be useful to refer to some of the rules which have been laid down in the *Rules* on this point.

No action to be defeated by misjoinder of parties.—No action is to be defeated by the misjoinder of parties, and the Court may, in every action, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. (*Rule 103.*) And the Court or Judge may, at any stage of the proceedings, either upon,

or without, the application of either party, and on such terms as may appear to the Court, or Judge, to be just, strike out, or add parties as plaintiffs, or defendants, in order to enable the Court effectually, and completely, to adjudicate, and settle, all the questions involved in the action. (*Ib.*)

(a) *Plaintiffs.*

1. *Parties jointly, or severally, interested.*—All persons may be joined as plaintiffs, in whom the right to any relief claimed is alleged to exist, whether *jointly*, or *severally*, or in the *alternative*. (*Rule 89.*)

This is a material change in the rule which formerly prevailed both at law and in equity. Formerly several plaintiffs having several claims against the defendant, could not join in the same suit, either at law, or in equity.

The advantage of the change may be illustrated by the effect it will have in actions brought upon policies of insurance, where several persons (as is often the case) have several interests in the moneys secured. Instead of separate suits being necessary as formerly (*Fraser v. Phoenix Mutual Life Ins. Co.*, 36 Q. B. 422), all parties interested can now join in one suit. Under the English Judicature Act, however, it has been held that two owners of distinct properties, cannot join in an action to restrain a nuisance: (*Appleton v. Chapel Town Paper Co.*, 45 L. J. Ch. 276.)

2. *Trustees, Executors, and Administrators,*—may sue on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such persons in the action. (*Rule 95.*)

So also any executor or administrator may sue for the administration of the personal estate, against any one legatee or next of kin, without joining the others (*Rule 102, Chy. O. 58 r. 6, Chy. O. 472*), and a trustee may sue any one *cestui que trust* for the execution of the trust, without adding the other *cestuis que trust* as parties. (*Chy. O. 58, r. 6.*)

Where, however, the object of the action is adverse to the interest of those who are beneficially interested, the persons beneficially interested should be made parties *e. g.*, where it is claimed by the plaintiff, that a devise or bequest to any person is void, or where the existence of the alleged trust is denied by the defendant. (*Houlding v. Poule*, 1 Chy. 206.)

3. *Residuary legatee, or next of kin*,—may, after the lapse of a year from the testator's death (*Vivian v. Westbrooke*, 19 Chy. 461), sue for the administration of the personal estate, without making the remaining residuary legatees, or next of kin, parties either as plaintiffs, or defendants. (*Rule 102, Chy. O. 58, r. 1.*)

4. *Legatee*,—interested in a legacy charged upon real estate, or a person interested in the proceeds of real estate directed to be sold, may, after the lapse of a year from the testator's death, (*Vivian v. Westbrooke, supra.*) sue for the administration of the estate, real and personal, of a deceased person, without making any other legatee or person interested in the proceeds of the estate, plaintiff or defendant. (*Rule 102, Chy. O. 58, r. 2.*)

5. *Residuary devisee*,—or *heir*,—may sue in like manner without making any co-devisee, or co-heir, plaintiff or defendant. (*Rule 102, Chy. O. 58, r. 3.*)

6. *Cestuis que trust*.—One of several, under a deed or instrument, may sue for the execution of the trust deed or instrument, without making any other of such *cestuis que trust*, plaintiff or defendant. (*Rule 102, Chy. O. 58, r. 4.*) But when *cestuis que trust*, by their conduct, have made themselves trustees, they ought to be made parties either as plaintiffs, or defendants. (*Jease v. Bennett*, 6 D. M. & G. 609.)

7. *Actions for protection of property pending litigation, and to restrain waste*.—In such actions one person may sue on behalf of himself and of all others having the same interest. (*Rule 102, Chy. O. 58, r. 5.*)

8. *Assignee of a chose in action*,—may sue for its recovery in his own name. (*R. S. O. c. 116, s. 7*, and see *MacLennan*, p. 19.) Under the analogous Imperial Act, to enable the assignor to sue in his own name, the assignment must be *absolute*; and it has been held by the English Courts that under an assignment in the nature of a charge the assignee cannot sue in his own name. (*National Provincial Bank of England v. Harle*, 44 L. T. 585.) Whether the Ontario Act, however, is so limited is not clear. (See *R. S. O. c. 116, s. 6*.) Whenever the assignment is not absolute, it would seem to be safer to join the assignor until the point shall have been settled by judicial decision.

9. *Infants*,—may sue by their next friends in the manner practised in the Court of Chancery before the passing of the Act. (*Rule 96*.) The next friend of an infant need not be a person of substance. (*Re McConnell*, 3 Chy. Ch. R. 423, and see *Taylor & Ewart*, 188.)

10. *Married Women*,—may sue without their husbands, and without next friends, in all cases relating to their *separate estate*, or to their *separate engagements* or *contracts*, and also in *suits for alimony*; and in other cases by the leave of the Court or a Judge, on giving, in such other cases, such security, if any, for costs, as the Court or a Judge may require. (*Rule 97*.) The application for such leave may be made to the Master in Chambers or any officer authorized to exercise the jurisdiction of the Master in Chambers. If the analogy of the proceeding to be allowed to sue in *forma pauperis* is to be followed, the application for leave to sue without a next friend, where one is necessary, would have to be made after the writ of summons was issued. (*Sm. Chy. Pr.* 7th ed. 871.) And it would seem necessary that notice of the application should be given to the defendant.

It is not very easy to determine what property is "separate estate" so as to entitle a married woman plaintiff, to sue in respect of it without a next friend. The difficulty arises from the doubtful effect of recent legislation as to

the property of married women, for while it enables a married woman to *hold and enjoy* her property as a *feme sole* and for her *separate use*, yet it seems, except in one instance, to stop short of giving her the right of disposing of it without her husband's concurrence, which is necessary to constitute it separate estate, as the term is understood in Equity. In Equity a married woman's *separate estate* is one that is free from her husband's control or interference, and one that she is capable of disposing of without his concurrence. This *jus disponendi* is an essential incident to a separate estate. As to real estate, this *jus disponendi* was held not to have been conferred on married women by *R. S. O. c. 125*, ss. 2 and 3, (*Royal Canadian Bank v. Mitchell*, 14 Gr. 414, approved in *Lawson v. Laidlaw*, 3 App. R. 77), and it was held the *jus disponendi* was not conferred on married women, as to *personalty*, by sections 2 and 5, (*Balsam v. Robinson*, 19 C. P. 263, and *Mitchell v. Weir*, 19 Chy. 568. See however, observations of Mowat, V. C., to the contrary as to *personalty*. *Chamberlain v. McDonald*, 14 Chy. 448.)

A married woman may be entitled to separate estate in two ways: *first*, by reason of its having been expressly settled to her separate use free from the debts and control of her husband; and *second*, under the provisions of the *R. S. O. c. 125*. Applying the principles laid down in the *Royal Canadian Bank v. Mitchell* to the construction of *R. S. O. c. 125*, ss. 2, 3, 4 and 5, it seems still open to doubt, notwithstanding the case of *Boustead v. Whitmore*, 22 Chy. 222, whether the legislature has succeeded in converting all a married woman's property therein referred to, into *separate estate*, as that term has always been understood in Courts of Equity. All of these sections enable a married woman to *hold and enjoy* her property free from the debts and obligations of her husband, but in none of them is the power expressly given to alienate and dispose of the property, real, or personal, without the husband's concurrence, which, as has been said, is considered one of the essential incidents of what is techni-

cally termed "*separate estate*." It is true section 4 expressly declares that the real estate is to be held and enjoyed for her "*separate use*"; but these words appear insufficient, of themselves, to constitute her property, which is so to be held and enjoyed, her "*separate estate*." According to the canon of construction laid down by *Draper, C. J.*, in *Kremer v. Glass*, 10 C. P. 470, the Act is not to be construed to alter the common law, except so far as is absolutely necessary to give full effect to its provisions. One of the principal reasons which induced the learned Vice-Chancellor to come to the conclusion he did in *Boustead v. Whitmore* was because he thought the husband's right to curtesy was absolutely taken away by the 35 Vic. c. 16, (O.), but the correctness of this opinion was afterwards expressly denied by the Court of Appeal (*Furness v. Mitchell*, 3 App. R. 510,) and all doubt on the point was set at rest by the declaratory Act, 40 Vic. c. 7, sched. A. The authority of *Boustead v. Whitmore* for the proposition that the *jus disponendi* is conferred by R. S. O. c. 125, s. 4, cannot therefore but be considered as very seriously shaken. The only section of R. S. O. c. 125 which plainly gives to a married woman not only the power to hold and enjoy, but also the power to *dispose of* her separate property, is the seventh section, and that section only relates to the wages and personal earnings of a married woman, and any acquisitions therefrom, and the proceeds or profits, from any occupation or trade, carried on by her separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, which after the 2nd of March, 1872, are declared to be free from the debts or dispositions of her husband, and may be held and enjoyed by such married woman and *disposed of* without her husband's consent as if she were a *feme sole*; and it therefore seems that it is only property expressly settled to her separate use, or which comes within R. S. O. c. 125, s. 7, which is the "*separate estate*" of a married woman, so as to entitle her to sue in respect of it without a next friend.

A married woman must sue by next friend in all actions not relating to her *separate estate* or *separate engagements*, or *contracts* or for *alimony*, and it would seem also necessary that her husband should in all such cases be made a defendant, or joined as a co-plaintiff. (*J. A. s. 12*; *Sm. Chy. Pr.* 7th ed. 312.)

Where a next friend is named, he must be a person of substance sufficient to answer costs, or the defendant may move to stay proceedings until a new and solvent next friend shall be appointed (*Rann v. Lawless*, 1 Chy. Ch. R. 333,) or security for costs given (*Van Winkle v. Chaplin*, 2 Chy. Ch. R. 98.) Any person, *sui juris*, may be next friend, provided his interest is not adverse to that of the married woman (*Anon.* 11 Jur. 258.) A defendant in the action is not eligible (*Ib.*, and see *MacLennan*, 149).

A married woman who is a pauper and unable to obtain a next friend, may, on special application, get leave to sue in *formâ pauperis*. (*Sm. Chy. Pr.* 7th ed., 271-2.)

Where a married woman improperly commences an action without a next friend, the proceedings will, on the application of the defendant, be stayed until a next friend shall have been appointed (*McPherson v. McCabe*, 1 Chy. Ch. R. 250,) and in default of the appointment of a next friend within a time to be limited, the action may be dismissed. (*Ib.*) The objection may be also taken by demurrer (*Jessup v. McLean*, 15 Chy. 489; *Blackburn v. McKinlay*, 3 Chy. Ch. R. 165).

Where a married woman wishes to change her next friend, the leave of the Court must be first obtained, on notice to the defendant, if he have appeared (*Eastman v. Eastman*, 2 Chy. Ch. R. 183; *Harvey v. Boomer*, 3 Chy. Ch. R. 11). If the defendant have not appeared, the order may be obtained *ex parte* on *præcipe* (*Sm. Chy. Pr.*, 7th ed., 276,) from the office from whence the writ issued, except in cases commenced at Toronto in the Queen's Bench and Common Pleas Divisions, in the latter cases

the orders, of course, will be granted by the Registrar of the Division in which the action is pending.

11. *Lunatics, and persons of unsound mind.*—An idiot or lunatic so found by inquisition, or by order of a Judge under *R. S. O. c. 40 s. 65*, sues by the committee of his estate.—(*Sm. Chy. Pr.* 7th ed., 311, *Rule 124*.) But a person of unsound mind, not so found by any judicial proceeding, may sue by his next friend. (*Light v. Light*, 25 Beav. 248, *Rule, 124*.) The rules applicable to the next friend of a married woman apply to the next friend of a lunatic. See *ante* p. 30.

12. *Numerous parties interested.*—Where there are numerous parties having the same interest in one action, one or more of such parties may sue on behalf, or for the benefit, of all parties so interested. (See *Rule 98*.)

A plaintiff suing under this *Rule* must indorse his writ with a statement that he so sues (*Rule 13*.) *e. g.*, "*The plaintiff's claim is on behalf of himself and all other creditors of the defendant A B.*"

A simple contract creditor suing to set aside an alleged fraudulent conveyance by his debtor, must sue on behalf of himself and all the other creditors of the debtor. (*Colver v. Swayze*, 26 Chy. 395.) But an execution creditor may either sue for himself alone, or on behalf of himself and other creditors. An ordinary creditor's suit for administration of the estate of a deceased debtor must be taken to be brought on behalf of the plaintiff and all other creditors, whether so stated or not. (*Colver v. Swayze, supra.*)

A part owner of a ship may sue on behalf of himself and his co-owners for freight, (*DeHart v. Stevenson*, 1 Q. B. D. 313,) and one underwriter on behalf of all. (*Leathley v. McAndrew*, W. N. 1875, 259, 1 Charley's Ch. Ca. 58.) In such actions if the other members of the class on whose behalf the action is brought are fairly repre-

sented, they will be bound by the judgment. (*Commissioners of Sewers v. Gellatly*, 3 Ch. D. 610; *Leathley v. McAndrew*, W. N. 1876, 2 Char. Ch. Ca. 24.) Where one of the class objects to the proceedings he may apply to be made a defendant, (*Wilson v. Church*, 9 Ch. D. 552,) he cannot otherwise appeal from any judgment obtained by the plaintiff. (*Watson v. Cave*, 44 L. T. 40.)

13. *Partners.*—Any two or more persons claiming as co-partners may sue in the name of their firm. (*Rule 100.*)

This is a variation of the former practice, both at law and in equity. Formerly the names of all the persons composing a firm, suing, must have been set out in the writ of summons, or bill of complaint.

Where a suit is brought in the name of the firm, any party to the action may apply in Chambers for an order to compel the plaintiff to deliver a statement of the names of the persons who are co-partners in such firm (*Rule 100*), which is to be delivered verified on oath or otherwise as the Judge may direct. (*Ib.*) The style of the cause, however, is not to be changed. See *post* chapter xvii.

14. *Attorney-General.*—No express provision is made in the *Judicature Act* or rules in reference to the procedure to be adopted in actions brought by the Attorney-General, except that it is provided that all suits hitherto commenced by bill, or information, in the Court of Chancery, shall now be instituted by writ of summons. (*Rules 1-5.*) The former practice in relation to the joinder of relators where necessary, must still be observed. It would also seem that the consent of the Attorney-General to the issue of a writ in his name is still necessary. As to the former practice on filing informations (see *Attorney-General v. Toronto Street R. W. Co.*, 13 Ch. 441; *S. C.* 2 Chy. Ch. R. 165; *S. C. ib.* 321.)

The Provincial Attorney-General is the proper officer to bring an action for the violation of the rights of the

public of Ontario. (*Attorney-General v. Niagara Falls International Bridge Co.*, 20 Chy. 34), where the cause of action relates to matters affecting the Dominion, the Attorney-General of the Dominion is the proper officer to bring the action.

(b) *Defendants.*

Parties jointly, or severally, liable.—All persons may be joined as defendants, against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and without any amendment, judgment may be given against such one or more of the defendants, as may be found to be liable, according to their respective liabilities. (*Rule 91.*)

It is no ground of objection that any defendant is not interested, as to all the relief claimed by the plaintiff, or as to every cause of action in respect of which the action is brought, but the Court, or Judge, may make such order as may appear just, to prevent any defendant from being embarrassed, or put to any expense, by being required to attend any proceedings in which he may have no interest. (*Rule 92, Cox v. Barker*, 3 Ch. D. 359.)

It is immaterial that the alternative relief asked against one defendant, is inconsistent with that asked against a co-defendant (*Honduras R. W. Co. v. Tucker*, 2 Ex. D. 301; *Child v. Stenning*, 5 Ch. D. 695), where a plaintiff succeeds against one defendant, and fails against another, the costs of the successful defendant must be borne by the plaintiff and not by the unsuccessful defendant (*Child v. Stenning*, 7 Ch. D. 413, 11 Ch. D. 82.) The plaintiff may also, at his option, join as parties to the same action all or any of the parties *severally*, or *jointly and severally*, liable on any one contract, including parties to bills of exchange, and promissory notes. (*Rule 93.*)

Infants.—may be made defendants and may defend by their guardians appointed for that purpose see *post* p. 64. The plaintiff cannot proceed to judgment against an infant

until a guardian *ad litem* has been appointed. (See *Rule 70, Chy. O. 518*).

Married women,—may be made defendants without joining their husbands as plaintiffs, or defendants, in all cases relating to their *separate estate* or to their *separate engagements, contracts, or torts*. (*Rule 97*). As to what is the *separate estate* of a married woman within the meaning of this rule. (See *ante* pp. 27-9.) In all suits relating to the property of a married woman, except property expressly settled to her separate use, or property to which she is entitled under *R. S. O. c. 125, s. 7*, it would seem advisable to make her husband a co-defendant. Where the plaintiff sues to set aside a fraudulent conveyance made to a married woman after 1872, and no conveyance is necessary, her husband is not a proper party. (*McFarlane v. Murphy*, 21 Chy. 80; *Murdock v. O'Sullivan*, 25 Chy. 39. See also *Boustead v. Whitmore*, 22 Chy. 222, and observations on that case *ante* p. 29.) With regard to a married woman's *separate engagements, contracts, and torts*, it does not appear that she can in any case be made personally liable. No judgment for the payment of money can be rendered against her *in personam*, but only one charging the separate property, if any, which she had *at the time the liability was incurred*, and which she *still has* at the time the judgment is pronounced. (*Pike v. Fitzgibbon*, 44 L. T. 562). It is therefore necessary in an action of this kind, to allege in the statement of the claim that the woman had, at the time the debt or liability was incurred, and still has, separate property which is liable for the satisfaction of the plaintiff's claim, see (*Clarke v. Creighton*, 45 U. C. Q. B. 514.)

U (An *interim* injunction cannot be obtained restraining a married woman from alienating her separate property, pending a suit to recover against her a separate debt, (*National Provincial Bank of England v. Thomas*, 24 W. R. 1013, and see remarks of Jessel, M. R., in that case, quoted in *Lawson v. Laidlaw*, 3 App. R. 84.) and it seems doubtful whether even where it is possible to specify in

the indorsement of the writ the separate real estate to which the married woman is entitled, and which is liable for the satisfaction of the claim, a certificate of *lis pendens* can properly be registered; or whether the plaintiff's claim would prevail against a *bond fide* purchaser for value, even with actual notice of the *lis pendens*; inasmuch as the charge does not arise until the judgment of the Court has been pronounced.

A married woman, although named as co-defendant with her husband, may file a statement of defence without any order giving her leave to defend separately from her husband, (*Chy. O. 613, J. A. s. 12.*) and will be bound by her defence so made as if she were a *feme sole*. (*Ib.*)

Lunatics.—A lunatic or idiot, or person of unsound mind, so found by inquisition, or judicial declaration, may be named as a defendant, but the committee of his estate should be joined with him as a co-defendant. (*Sm. Chy. Pr. 7th ed. 311, J. A. s. 12.*) Where the lunatic is not so found by inquisition or judicial declaration, he may be made a defendant, but the plaintiff cannot after service of the writ proceed further with the action, until either the defendant has procured a guardian *ad litem*, to be appointed for him in the action, or the plaintiff has procured such appointment to be made. (See *Rule 39. Chy. O. 104 and 518.*) But where a lunatic defendant is a mere formal party, under the English Act it is held unnecessary for the plaintiff to apply for the appointment of a guardian to him. (*Taylor v. Pede, 44 L. T. 514.*) *Rule 39*, however, appears to apply to all cases whether the lunatic has, or has not, a substantial interest in the subject of litigation.

Partners.—may be sued in the name of their firm, (*Rules 100, 101.*) and the plaintiff may afterwards make application in Chambers for an order requiring the defendants to furnish a statement of the names of the persons who are co-partners in any such firm, in such manner, and

verified on oath or otherwise as may be directed. (*Rule 100.*) Formerly both at law and in equity, it was necessary, when suing a firm, to set out the individual names of the partners in the style of cause. See *post* p. 150.

Trustees, Executors, and Administrators,—may be sued as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate; but the Court, or a Judge, may at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition, or substitution, of the previously existing parties. (*Rule 95.*) Where the object of the suit, however, is to defeat or destroy the estate of the beneficiaries, it would still seem advisable to join one or more of the beneficiaries whose interest is attacked, as defendants, in the first instance. (See *Chy. O. 61, Baker v. Trainor*, 15 *Chy. 252*; *Cleveland v. McDonald*, 1 *Chy. 415.*)

Mortgage Suits.—A surety for the payment of a mortgage debt, may be joined as a defendant with the mortgagor, in any suit brought by the mortgagee for sale of the mortgaged property; and an order for the payment of the deficiency, if any, may be obtained against both. (*Chy. O. 427.*)

Where the plaintiff is a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party. (*Chy. O. 439.*)

But where the plaintiff sues for a sale, or foreclosure, *subject to a prior mortgage*, the prior mortgagee is not to be made a party except under special circumstances to be alleged. (*Chy. O. 440.*)

Where the parties interested in the equity of redemption are numerous, one or more of the parties interested, may be made defendant or defendants; and on it appearing to the Court to be conducive to the ends of justice, by reason of the other parties interested in the equity of redemption

being numerous or otherwise, the Court may order such other parties so interested be made parties in the Master's office, upon such terms as the Court sees fit. (See *Chy. O. 438.*)

Where the mortgagor is dead, his widow, if any, and real representatives are usually the proper parties to be joined as defendants in actions for foreclosure, or sale; the personal representative appears to be a necessary party only where relief is asked against the general estate of the deceased mortgagor, *e. g.*, upon a covenant in the mortgage.

2. JOINDER OF CAUSES OF ACTION.

Having considered the question of the parties by and against whom an action may be brought, it is necessary now to consider briefly the causes of action which may be joined in one action. Some important changes, in reference to the character of the claims which may be sued for in the same action, have been made.

Causes of action which may be joined.—Subject to the exceptions hereafter mentioned a plaintiff may unite in the same action several causes of action. (*Rule 115.*) Thus, where the plaintiff sued L and T and claimed relief against L on a contract alleged to have been made by T as his agent, if T was authorized to make the contract as his agent, but if not so authorized then against T, it was held that these causes of action were properly joined. (*Honduras R. W. Co. v. Tucker*, 2 Ex. D. 301), and where the plaintiff claimed damages from S. for trespass; or in default from W., who had covenanted for quiet enjoyment; both were held to be rightly made defendants. (*Child v. Stenning*, 5 Ch. D. 695.)

A cause of action against a schoolmaster, for breach of contract, to personally look after plaintiff's son, was held on appeal, to be properly joined with a cause of action against the doctor for negligent treatment of the son, which resulted in his death at the school. (*Howell v. West*, W. N. 1879, 90.)

So eight plaintiffs, who had each an independent cause action against the defendant, in respect of the same libel, were held entitled to sue together in one action. (*Booth v. Briscoe*, 2 Q. B. D. 496). See also (*Bagot v. Easton*, 7 Ch. D. 1; *Dessilla v. Schunck*, W. N. 1880, 96).

Husband, and Wife,—claims by, or against, them jointly, may be joined with claims by, or against, either of them separately. (*Rule 118*.)

Executors, or Administrators.—Claims by, or against, them as executors or administrators may be joined with claims by, or against, them personally; provided such last mentioned claims be alleged to arise with reference to the same estate, in respect of which the plaintiff, or defendant, sues, or is sued, as executor, or administrator. (*Rule 119*.)

Joint Claims, may be joined with Separate Claims.—Joint claims by several plaintiffs, may be joined with separate claims by them, or any of them, as against the same defendant. (*Rule 120*.)

Remedy, where two or more Causes of Action are improperly joined.

Separate Trials may be ordered.—If it appear to the Court, or a Judge, that any causes of action joined in the same action, cannot be conveniently tried together, the Court, or Judge, may order separate trials to be had, of any of such causes of action so joined in one action, or may make such other order as may be necessary or expedient for the separate disposal thereof. (*Rules 115, 121*.)

For cases in which a separate trial has been ordered, see (*Bagot v. Easton*, 7 Ch. D. 1; *Child v. Stenning*, 5 Ch. D. 695; *Day v. Radcliffe*, 24 W. R. 844; *Barker v. Cox*, 3 Ch. D. 359.)

Causes of action improperly joined, may be struck out.—When a plaintiff joins two or more causes of action, which cannot be conveniently disposed of together, in the same action, on the application of the defendant at any time,

the Court, or a Judge, may order the action to be confined to such of the causes of action as can be conveniently disposed of in one proceeding, and may direct the writ and indorsements, and statement of claim, if any, to be amended accordingly, upon such terms as to costs as may be just. (*Rules 122, 123.*)

Causes of Action which cannot be Joined.

(a) *Actions for the recovery of land*, cannot (without the leave of the Court, or a Judge, first obtained)—(*Rule 116*)—be joined with any other cause of action, except:—

- (1) Claims for *mesne* profits, or for arrears of rent in respect of the same land, or any part thereof.
- (2) Claims for damages for breach of any contract under which such land, or any part thereof, is held.
- (3) And when the action is for the recovery of mortgaged land, there may also be joined, without leave, a claim for the foreclosure of the equity of redemption; or for the sale of the land; and a claim on the covenant, if any. (*Rule 116.*) (a)

(b) Claims by an *assignee in insolvency*, may not be joined with any claim by him in any other capacity, except by leave of the Court, or Judge, first obtained. (*Rule 117.*)

(c) Claims by, or against, an *executor, or administrator*, cannot be joined with claims by, or against, such executor,

(a) A mortgagee should specifically claim the relief he demands, and should not claim sale, or foreclosure in the alternative, otherwise in default, the judgment cannot be obtained on *præcipe*. (*Drewry v. O'Neil*, 2 Chy. Ch. R. 204.)

or administrator, *personally*, unless the latter claims arise in respect of the same estate, in respect of which he sues, or is sued, as executor, or administrator. (*Rule 119.*)

Where it is necessary to obtain the leave of the Court, or Judge, to join in one action two or more causes of action which cannot otherwise be joined, the leave should be obtained on motion in Chambers, before the writ issues. (*Pilcher v. Hinds*, 11 Ch. D. 905, *Trust & Loan Co. v. Osborne*, before R. G. Dalton, Q. C., August 24, 1881.) In such a case the application should be made "In the matter of an intended action between A B, plaintiff, and C D, defendants."

Actions against Defendants resident out of Ontario.

The causes of action, for which an action may be brought against a defendant resident out of Ontario, are enumerated *post* p. 66.

CHAPTER IV.

THE WRIT OF SUMMONS.

1. *Actions to be commenced by Writ of Summons.*
2. *Place of issue of Writ.*
3. *By whom to be issued.*
4. *How issued.*
5. *Form of Writ.*
6. *Time to be limited in the Writ, for Appearance thereto.*
7. *Date, and Teste, of Writ.*
8. *Indorsement of Writs of Summons.*
9. *Issue of the Writ.*
10. *Certificate of Lis Pendens.*
11. *Concurrent Writs.*
12. *Duration, and renewal, of Writs.*
13. *Amendment of Writs.*
14. *Setting aside Writs.*

Having considered the subject of the parties who may sue and be sued, and the causes of action which may be joined together, we proceed to consider the mode in which the action is to be commenced and carried on, under the new system of practice laid down by the *Judicature Act*, and first we propose to treat of:—

1. ACTIONS TO BE COMMENCED BY WRIT OF SUMMONS.

All actions and suits which, prior to the passing of the *Judicature Act*, were commenced in the Courts of Common Law by writ of summons, or in the Court of Chancery by bill, or information, are now to be instituted in that

42 ACTIONS TO BE COMMENCED BY WRIT OF SUMMONS.

Division of the Supreme Court which is termed the "High Court of Justice," by a proceeding to be called an action, (Rule 1), which is to be commenced by the issue of a writ of summons. (Rule 5.)

The class of cases which are to be commenced by the issue of a writ of summons, embraces most of the causes of suit which have heretofore been prosecuted in the Superior Courts of Law, or the Court of Chancery.

There are some proceedings, however, which were not commenced by the issue of a writ of summons, or the filing of a bill, and these proceedings must still be commenced in the way they have hitherto been prosecuted. (Rule 4) *e. g.*

- (a) Cases in which the plaintiff desires to obtain a writ of *capias ad respondendum* against an absconding debtor. (*R. S. O. c. 68.*)
- (b) Actions of replevin. (*R. S. O. c. 53.*)
- (c) Applications by Sheriffs for interpleader orders.
- (d) Applications for writs of *mandamus*, prohibition, *certiorari*, *quo warranto*, or *habeas corpus*.
- (e) Applications for the administration of estates of deceased persons, in simple cases. (*Chy. O. 467-73, 638-9.*)*
- (f) Applications for partition of real estate, by one tenant in common against his co-tenants, in simple cases. (*Chy. O. 640-1.*)*
- (g) Applications for the sale of infants' estates, under *R. S. O. c. 40.*
- (h) Applications under the Trustee Relief Acts.

* In the class of cases coming under clauses *e* and *f*, the action may be commenced by writ of summons, or by notice of motion, or summons, in Chambers, but the extra expense (if any) of issuing a writ of summons will probably be cast upon the plaintiff. (See Rule 3.)

- (i) Applications to obtain a declaration of lunacy.
(*R. S. O. c. 40, s. 65.*)
- (j) Applications concerning the custody or guardianship of infants.
- (k) All other applications formerly made in Chancery upon petition without a bill being filed; or at Common Law without the issue of a writ of summons.

The *Judicature Act* has however effected this change that, even in the excepted class of cases, the proceedings may now be prosecuted in any Division of the High Court the suitor may select. No Division of the High Court having any longer any exclusive jurisdiction in respect of any civil cause of action whatever.

2. PLACE OF ISSUE OF WRIT.

In any action whatever, the plaintiff, wherever resident, may issue a writ of summons either at Toronto, or in any county. (*Rule 20.*)

In actions for the recovery of land, however, although the writ may be issued in any county, the action must be tried in the county where the land lies. (*Rule 254.*)

3. BY WHOM TO BE ISSUED.

Where the writ is required to be issued from either the Queen's Bench, or Common Pleas, Division, the application for the issue of the writ must be made to the *Clerk of the Process* if the action is commenced in Toronto, or to the *Deputy Clerk of the Crown*, or *Local Registrar*, in any outer county: these officers are required to issue writs alternately in the Queen's Bench, and Common Pleas, Divisions. (*Rule 21.*)

In actions to be commenced by writ of summons in the Chancery Division the application for the issue of the writ must be made to the *Clerk of Records and Writs* in

Toronto, or to any *Deputy Registrar*, or *Local Registrar*, in any outer County.

4. HOW ISSUED.

The former practice at law relating to the issue of writs of summons, has been somewhat changed. The writ is now to be prepared by the solicitor, and may be written or printed, or partly written and partly printed. (*Rule 23.*) Printed forms of writs can be obtained at the law stationers.

It seems that the suitor is not intended to have the privilege of selecting his forum as between the Queen's Bench, and Common Pleas, Divisions, inasmuch as the writs for these Divisions are required to be issued alternately, but he may if he choose select the Chancery Division.

5. FORM OF WRIT.

For form of a writ of summons for service within Ontario see *Form No. 1.* For form of a writ for service on a British subject out of the jurisdiction see *Form No. 2,* and for form of notice of writ to be served on a foreigner out of the jurisdiction see *Form No. 3.* The solicitor is required to fill in the names of the plaintiffs, and defendants, and also to make the indorsement of the claim for which the action is brought. For forms of indorsements see *Forms Nos. 4, 5, 6, 7, 8, and 9.*

6. TIME TO BE LIMITED IN THE WRIT, FOR APPEARANCE THERETO.

The time to be named in the writ for the defendant to appear thereto, varies according to the place where it is intended to serve the writ.

(a) Where the service is to be made in Ontario, the time to be named in the writ for appearance thereto, is to be *ten days* after service. (*Rule 9.*)

(b) Where the service is to be made within any part of the Dominion of Canada (other than Ontario, Manitoba,

where service is made
in Ontario
10 days
in other parts of the Dominion
20 days

Keewatin, or the North-West Territories, or British Columbia), or within the United States, the time for appearance is to be *six weeks* after service.

(c) Where the service is to be made within any part of the United Kingdom (including the Isle of Man and the Channel Islands), or Manitoba, Keewatin, or the North-West Territories, British Columbia, or Newfoundland, the time for appearance is to be *eight weeks* after service.

(d) If the writ is to be served elsewhere than within the limits above designated, the time for appearance is to be *twelve weeks* after service. (*Rule 46.*)

Where the writ is to be served elsewhere than in Ontario the plaintiff is to serve with the writ a statement of his claim and the defendant must, within the time limited for putting in an appearance also deliver his defence. (*Rule 46, see however Rules 47 and 462, as to power of Judge to alter the time limited by Rule 46.*)

7. DATE, AND TESTE, OF WRIT.

The writ must bear date on the day on which it is issued, and must be tested in the name of the President of the High Court of Justice. (*Rule 9.*) The Chief Justice of the Queen's Bench is, at present the President of the High Court.

8. INDORSEMENT OF WRIT OF SUMMONS.

Before the writ is presented to the officer to be signed and sealed, it must be indorsed with the following indorsements:

1. A statement of the nature of the claim made, or of the relief, or remedy, required in the action. (*Rule 5.*) For forms of these indorsements, where the claim is for money, see *Form No. 4*: for damages, see *Form No. 5*: for matters formerly belonging to the exclusive jurisdiction of the Court Chancery, see *Form No. 9* (and see *Rule 17*). In actions for foreclosure or sale, a description of the lands should also be indorsed; and where no reference as to encumbrances is required, there should be a specific claim indorsed for the amount due, as in *Form No. 7*, as well as the indorse-

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ment provided in *Form No. 9*, otherwise only a judgment for a reference to the Master can be granted.

The plaintiff, by leave of the Court, or a Judge, or the *Master in Chambers*, or any officer entitled to exercise the power of the *Master in Chambers*, may amend the indorsement so as to extend it to any other cause of action, or any additional remedy, or relief. (*Rule 11.*) Care, however, should be taken in the preparation of the indorsement in the first instance, as the expense of any amendment will generally have to be borne by the plaintiff in any event. (*MacLennan, 95.*)

If none of the forms provided by the Act are found applicable, then such other similar concise form, as the nature of the case may require, may be used. (*Rule 12.*)

Where a certificate of *lis pendens* is required, a description of the land in question, must also be indorsed on the writ. See note to *Form No. 9*.

II. *Special Indorsement.*—In addition to the indorsement above referred to, there must also be indorsed a *special indorsement* when the plaintiff seeks merely to recover a debt, or liquidated demand in money, payable by the defendant, with, or without, interest, *e. g.*, a debt or liquidated demand, arising upon a contract, express, or implied, as for instance on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal, for payment of a liquidated amount of money, or on a statute when the sum sought to be recovered is a fixed sum, or in the nature of a debt, or on a guaranty, whether under seal or not, when the claim against the principal is in respect of such debt, or liquidated demand, bill, cheque, or note, or on a trust. (*Rule 14.*)

Rule 14 applies to all those cases in which under the *Common Law Procedure Act*, a writ could be specially indorsed, and also to cases of debt due upon a trust. For form of *special indorsement* in such cases, see *Form No. 7*.

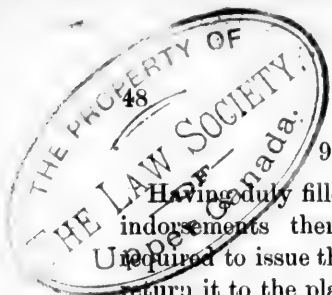
Where the writ of summons is *specially indorsed*, the indorsement must also state the amount claimed for debt

or in respect of the demand for which the action is brought, and for costs respectively, and must state further that upon payment thereof within eight days, where the writ is for service within the jurisdiction—or within such time as is allowed for appearance—where the writ is for service out of the jurisdiction,—further proceedings will be stayed. (*Rule 15.*) For form of this indorsement, see *Form No. 5.* It is necessary that the claim for costs should not be excessive, as notwithstanding payment pursuant to such indorsement, the defendant may have the costs taxed, and if more than one-sixth be disallowed, the plaintiff's solicitor must pay the costs of taxation. (*Rule 15.*)

III. *Character in which Plaintiff, or Defendant, sues, or is sued.*—If the plaintiff sues in a representative capacity, or if any of the defendants are sued in a representative capacity, the indorsement must show the capacity in which the plaintiff, or defendant, sues, or is sued. (*Rule 13.*) For form of this indorsement see *Form No. 8.*

IV. *Name and Address of Solicitor.*—There must also be indorsed in all cases the name and address of the solicitor, if any, by whom the writ is sued, and when such solicitor acts as agent, the name and address of the principal solicitor for whom he is agent, must also be indorsed. (*Rule 18.*)

V. *Name and address of Plaintiff suing in person.*—Where the plaintiff sues in person, his place of residence and occupation must be indorsed; and if his residence be more than two miles from the office out of which the writ issues, there must be further endorsed an address for service not more than two miles from such office. If the latter address be omitted, when necessary, the defendant may serve subsequent proceedings on the plaintiff, by posting the same up in the office whence the writ issued, (*Rule 19*), or,—in actions commenced in the Queen's Bench, and Common Pleas, Divisions, in Toronto,—in the office where the appearance is to be entered.



ISSUE OF WRIT.

9. ISSUE OF THE WRIT.

Having duly filled up the writ and made the necessary indorsements thereon, it must be taken to the officer required to issue the same, who will sign and seal (*a*) it, and return it to the plaintiff or his solicitor, having first made the necessary entries in the Process Book, of the names of the plaintiffs, and defendants, and the date of the writ and the number. (*Rule 26*). According to the English practice of the Chancery Division a *præcipe* is filed for the writ, but no form of *præcipe* is given in the Ontario Rules except for the amendment or renewal of the writ of summons, nor do the rules expressly require, a *præcipe* to be filed on the issue. (In case of writs of execution, see *Rule 347*, which expressly requires a *præcipe* to be filed.) The former practice of the Queen's Bench, however, was to file a *præcipe*, and it is possible this practice may be continued. (See *J. A.*, s. 12.) (*b*)

When the writ is to be issued from either the Queen's Bench, or Common Pleas, Divisions, the name of the Division should be left blank, to be filled in by the officer who issues the summons, as writs for these Divisions must be issued by him alternately. (*Rule 21*).

On presenting any writ of summons for sealing, a copy of the writ and the indorsements "may" be filed; this copy, if filed, must be signed by the plaintiff's solicitor, or by the plaintiff himself if he sue in person. (*Rule 25*.)

The filing of a copy of the writ at the time of issuing the original is optional. (See *Rule 159*.)

(*a*) The seals to be used in the office at Osgoode Hall are the same as heretofore used by the officers who are to issue writs, until the Lieutenant-Governor in Council shall prescribe another. (*J. A.*, s. 8.) The seals to be used in the offices of the Deputy-Registrars, Deputy-Clerks of the Crown, and Local Registrars are such as the Lieutenant-Governor in Council may prescribe. (*J. A.*, sec. 5.)

(*b*) The officers who issue writs in Toronto, require a *præcipe*, or a copy of the writ, to be filed.

10. CERTIFICATE OF *lis pendens*.

Having issued the writ; in cases affecting lands where it is desired to register notice of the action in the Registry Office, a certificate of *lis pendens* must be obtained.

In order to obtain the certificate it will be necessary that the writ shall be indorsed with a description of the lands sought to be affected. (See *Form* No. 9, note.) A short description sufficient to identify the property for the purpose of registration will in general suffice, *e.g.*, "The plaintiff's claim is to have the conveyance of lot 8, in the 2nd concession of Dawn, in the County of Lambton, made by the defendant A. B. to the defendant C. D. set aside." The certificate will be issued in Toronto in cases in the Queen's Bench, and Common Pleas, Divisions, by the Registrars of those Divisions, and in all other cases by the officer by whom the writ is issued, and must be signed by him and sealed with the seal of the Court or the seal of office, if any, of the officer signing the same. (*R. S. O.* c. 111, s. 49; *R. S. O.* c. 40, ss. 89 and 90, and *J. A.* s. 51.) For form of certificate, see *R. S. O.* c. 40, s. 90.

In cases where a certificate of *lis pendens* has been improperly registered, on application in Chambers, it has been ordered to be vacated, *e.g.*, in a suit for alimony. (*White v. White*, 7 Pr. R. 208.)

Wherever the title to land is not in question in the action, the plaintiff cannot properly register a *lis pendens* merely to prevent a defendant alienating land which would be liable to satisfy the judgment, if the plaintiff should succeed in the action.

11. CONCURRENT WRITS.

One or more concurrent writ, or writs, of summons may be issued at any time within twelve months from the issue of the original writ of summons. The concurrent writ is not necessarily a transcript of the original writ, but if some of the defendants are residing within and others with-

out, the limits of Ontario, one may be in the form No. 1, and the other in the form No. 2. Each concurrent writ is to be marked, by the officer issuing it, "concurrent," and is to bear date the same day as the original writ. The concurrent writ is to be in force for the period which the original writ in the action shall be in force. (*Rule 27*). Where different times are to be mentioned for different defendants to appear, the proper course is to issue concurrent writs. (*Trail v. Porter*, 1 Ir. L. R., Ch. D. 60; *MacLennan* 103, *Rule 28*.)

12. DURATION OF WRITS OF SUMMONS, AND RENEWALS THEREOF.

An original writ of summons must be served within twelve calendar months, (*Rule 454*), from its date inclusive of such date. (*Rule 31*.) Where a concurrent writ of summons is issued, it must be served within the like period. (*Rule 27*.) But *before the time for service has elapsed* (see, however, *Rule 462*; *re Jones, Eyre v. Cox*, 46 L. J. Ch. 316; *Doyle v. Kaufman*, 3 Q. B. D. 7; S. C. *Ib.* 340,) the plaintiff may make application to a Judge, or the *Master in Chambers*, for leave to serve the writ after, and notwithstanding the lapse of the twelve months. (*Rule 31*.)

The Judge or *Master in Chambers* if satisfied that reasonable efforts have been made to serve the defendant, or for other good reason, may order that the service shall be good if made within twelve calendar months, (see *Rule 454*), after the date of the order. Further renewals may also from time to time be obtained in like manner. (*Rule 31*.)

Where the writ is renewed the order for renewal must be taken to the officer by whom the writ was issued, together with a *præcipe*, (see *Form No. 76*,) and he will mark it renewed, with the date of renewal.

Where a writ is renewed, the action is, notwithstanding the renewal to be deemed to have been commenced, as of the date of the original writ. (*Rule 31 c*.)

On and after the 1st January, 1882, any Judge of a County Court, except the Judges of the County Court of York, and any *Local Master* who does not practice as a barrister or solicitor, and who has not taken out a certificate to practice, may in regard to actions brought in their respective counties, entertain applications for the renewal of writs of summons. (*Rule 422.*) The jurisdiction of *Local Masters* who are not County Court Judges, is confined in such cases to actions in the Chancery Division, and where a *Local Master* has jurisdiction to act, the jurisdiction of the County Court Judge is confined to actions in the Queen's Bench, and Common Pleas, Divisions.

13. AMENDMENT OF WRIT.

After the writ has been issued neither the writ nor the indorsement thereon can be altered, either before, or after service, without an order. The Court, or a Judge, may allow an amendment of the writ, at any stage of the proceedings. (*Rule 10.*) The application for amendment must in general be made in Chambers. The plaintiff by leave of the Court, or a Judge, may also amend the indorsement so as to extend it to any other cause of action, or any additional remedy, or relief. (*Rule 11.*)

When the statement of claim has been delivered, an amendment of the indorsement on the writ would seem unnecessary. (*Large v. Large*, W. N. 1877, 98: *Johnson v. Palmer*, W. N. 1879, 87). As to amendments by adding or striking out parties. See *post* chapter xx.

14. SETTING ASIDE WRIT.

The defendant may apply to set aside the writ for irregularity if it do not comply with the *Rules*. (See however *R. S. O.* c. 49, ss. 7, 8; *Peterkin v. Macfarlane*, 4 App. R. 25.)

CHAPTER V.

SERVICE OF WRIT OF SUMMONS.

1. *Service on Solicitor.*
2. *Personal Service.*
3. *Substituted Service.*
4. *Service on Particular Defendants.*
 - Married Women.*
 - Infants.*
 - Lunatics.*
 - Partners.*
 - Corporations Aggregate.*
5. *Service out of the Jurisdiction.*
6. *Indorsement on writ of Date of Service.*
7. *Affidavit of Service.*

1. SERVICE ON SOLICITOR.

Personal service of the writ is unnecessary, where the defendant's solicitor accepts service, and undertakes to enter an appearance. (*Rule 33.*) This acceptance and undertaking may be in the following form to be indorsed on the original writ: "I accept service of the within writ and of the several indorsements thereon for the within named defendant A. B., as his solicitor, and undertake to enter an appearance for him in this action, according to the exigency of the said writ.

Dated this, &c.

(*Signature of Solicitor.*)"

Witness A. B.

This must be verified by affidavit in the event of further proceedings. (See *Rule 71.*) When the acceptance is not indorsed on the writ, there may be a difficulty in establish-

ing the identity of the writ, and the indorsement referred to in the acceptance, with the original writ in the cause.

A solicitor neglecting to enter an appearance pursuant to his undertaking, is liable to attachment. (*Rule 60.*)

When a solicitor is served, it is desirable that his authority to accept service should be first ascertained. Under the former practice, where an attorney without authority appeared for a defendant who had not been served with process, the proceedings were set aside. (*Rossier v. Westbrook*, 24 C. P. 91, and see *Quantz v. Smeltzer*, 6 Pr. R. 125). When, however, the defendant had been personally served with the writ, and an unauthorized appearance was subsequently entered by an attorney, the remedy of the defendant was against the attorney, and the proceedings, as a general rule, in the absence of *mala fides*, on the part of the plaintiff could not be disturbed. (*Moran v. Schermerhorn*, 2 Pr. R. 261.)

2. PERSONAL SERVICE.

Where service is not effected on a solicitor, personal service is requisite, wherever practicable. The former practice in Chancery as to the service of bills, differed from that at law as to the service of writs. Service of a bill on a grown-up person at the defendant's place of residence sufficed, but in such case an order *pro confesso* could only be obtained on notice; but at law, the writ of summons must have been delivered personally to the defendant, or brought to his knowledge, (*MacLennan*, 107,) unless otherwise ordered.

Under the *Judicature Act* the writ is to be served "by the same person and in the same manner as service is now made." (*Rule 34.*) The procedure to be followed would therefore seem to be that which formerly prevailed in the Courts of Common Law, in which Courts alone writs of summons were issued or served.

Under *R. S. O. c. 50, s. 335*, the service must be effected by the sheriff, or his officers, or no fees for mileage or service will be allowed, except in the cases provided for in the 23rd section of that Act, viz., when the writ has been in the sheriff's hands ten days without service being effected; and except where the service is effected out of the jurisdiction. The service must be effected by some literate person.

3. SUBSTITUTED SERVICE.

Where personal service for any reason cannot be promptly effected, an application may be made in Chambers for effecting service in some other way, or for the substitution of notice for service (*Rule 34*), *e.g.*, by publication of an advertisement, &c., and where the writ is to be served out of Ontario, (see *Rule 47*.) For form of order, see *Form No. 111*. Substituted service will not be allowed, however, in cases where the writ could not have been effectually served personally, *e.g.*, a writ against a Colonial Government. (*Sloman v. Governor of New Zealand*, 1 C. P. D. 563; and see, *Wolverhampton and Staffordshire Banking Co. v. Bond*, 43 L. T. 72.) When an order for substituted service is made, a copy of the order should usually be served with the writ, in the mode prescribed by the order for the service of the writ.

4. SERVICE ON PARTICULAR DEFENDANTS.

Married women,—may be served in the same manner, and with the like effect as *femes soles*. (*Rule 35*.)

Infants.—The mode of service on an infant defendant depends on the nature of the action, and his place of residence.

- (a) *When personal service on Infants is necessary*.—Where the action is brought to recover money from an infant personally, or to recover possession of lands, goods, or chattels, of which he is personally in possession, the writ must be personally served on the infant; and wherever personal service on an infant is effected, a copy of the

writ must also be sent by post pre-paid to, or delivered at, the office of the *Official Guardian*. (*Rule 37*).—Personal service is also necessary in actions in the Queen's Bench, and Common Pleas, Divisions, where the infant is resident out of Ontario.

(b) *Where service on the Official Guardian alone is sufficient*.—In all other cases, including actions for the administration, or partition, of an estate in which an infant is interested, service on the *Official Guardian* alone, is good service on the infant if resident within Ontario; and where there is more than one infant defendant, one copy only of the writ need be served on the *Official Guardian*. (*Rule 36*).—If the infant be resident out of Ontario, he must be served according to the former practice. For practice in Chancery Division (see *Chy. O.* 610, 612), in Queen's Bench, and Common Pleas, Divisions. (*Arch. Pr.* 11th ed., 1230-1233.)

Lunatics.—Service may be effected on a lunatic defendant by delivering a copy of the writ to his committee, or to the person with whom he resides, or under whose care he is, unless the Court, or a Judge, otherwise orders. (*Rule 38*.)

The Inspector of Prisons and Public Charities is *ex officio*, and by his name of office, the committee of every lunatic detained in a public asylum, who has no other committee. (*R. S. O. c. 22, s 49*.) Where a lunatic defendant has no committee, no further proceedings after service of a writ can be taken against him until a guardian *ad litem* is appointed (*Rule 39*), and where no application for the appointment is made by or on behalf of the lunatic, it will be necessary for the plaintiff to apply for the appointment. (*Rule 69*.)

Partners.—Where partners are sued in the name of their firm, the writ is to be served on any one or more of the partners, or at the principal place of business of the partnership within Ontario, upon any person having at the time of service the control or management of the partnership there, and such service is good service on the firm. (*Rule 40*.)

Person carrying on business, in name of a Firm.—Where one person carrying on business in the name of a firm consisting of more than one person, is sued in the firm's name, the writ may be served at the principal place

within Ontario, of the business so carried on, on any person having, at the time of service, the control or management of the business there, and such service is to be good service on the person so sued. (*Rule 41.*)

Corporations Aggregate—Companies, and Societies.—Corporations aggregate, companies, and societies, whether incorporated or not, may be served in accordance with any existing statutory provision for the service of any writ of summons, bill, petition, or other process on such corporation, &c. (*Rule 42*) As to mode of service on corporations aggregate generally, (see *R. S. O. c. 50, ss. 21, 22*),—and on joint stock companies incorporated under any general, or special, Act of the Legislature of Ontario, (*R. S. O. c. 149, s. 43.*)—and on joint-stock companies incorporated by letters patent issued by the Lieutenant-Governor of Ontario (*R. S. O. c. 150, s. 60*),—and on joint-stock companies incorporated by letters patent issued by the Governor General of the Dominion of Canada, (*40 Vic. c. 43. 61 (D).*)

The mode of service prescribed by the statute must be strictly pursued, and if for any reason the statutory mode is impracticable, application should be made in Chambers for leave to effect service in some other way.

Actions to recover Land.—Where the land is vacant, if service cannot otherwise be effected, it may be made by posting a copy of the writ on the door of the dwelling house, or other conspicuous part of the property. (*Rule 43.*)

5. SERVICE OUT OF JURISDICTION.

Where a defendant is to be served out of the jurisdiction, he is to be served, if a British subject, with a writ of summons in the prescribed form, see *Form No. 2.*

Where the defendant is a foreigner, the writ is to be issued in the same form, but in lieu of serving him with the writ, he is to be served with a notice, (*Rule 8*), see *Form No. 3.* Service of the notice is to be effected in the same manner, as service of a writ. (*Rule 49.*)

In both cases, with the writ, or notice of writ, the defendant should also be served with the plaintiff's statement of claim. (*Rule 46d and Rule 158c.*)

A defendant served out of the jurisdiction is to deliver his statement of defence as well as enter an appearance within the time limited for appearance. (*Rule 46.*)

6. INDORSEMENT OF DATE OF SERVICE.

The person serving a writ of summons is, within three days after the service, to indorse on the original writ the day of the month and the week of the service thereof. (*Rule 44.*) It will also be advisable to add the year. Unless the indorsement required by *Rule 44* be made the plaintiff cannot proceed with the action in default of appearance, without first obtaining leave in Chambers, the expense of which application must in any event be borne by the plaintiff. (*Ib.*)

This rule as to making the indorsement has been held in England only to apply, where the service has been personal, and not to cases where substituted service has been effected. (*Dymond v. Croft*, 3 Ch. D. 512.)

7. AFFIDAVIT OF SERVICE.

In order to proceed in the action in default of an appearance being entered, it is necessary to prove the service of the writ by affidavit. The affidavit may be in the form heretofore used at Common Law. Besides proving the service it must also show when the indorsement of the date of service was made on the writ by the deponent (*Rule 44*), and also the number of miles travelled to effect service.

Where a solicitor has given an acceptance of service and undertaking to appear, the signature of the solicitor must be verified by affidavit before further proceedings, in default of appearance, can be taken. (*Rule 71.*)

CHAPTER VI.

APPEARANCE.

A defendant is to enter his appearance at the office from whence the writ issued, except where the writ is issued by the Clerk of the Process, in which case the appearance and all subsequent proceedings to final judgment are to be carried on in the office of the Registrar of the Division in which the writ issued. (a) The appearance to a writ of summons is entered by delivering to the proper officer a memorandum in writing, in the prescribed form, (see *Form No. 77*), with such variations as may be necessary. (*Rule 55.*) The defendant is to state in his appearance whether he does, or does not, require the delivery of a statement of claim.

In an action for the recovery of land where it is intended to limit the defence to a part of the land claimed; for form of appearance, see *Form No. 78*.

Where a new defendant is added after the issue of the writ, by order in the nature of an order of revivor under the former practice in Chancery, for form of appearance for such new defendant see *Form No. 79*.

Where a third party is served with notice by a defendant claiming contribution over against him under *Rule 108*, for form of appearance for such third party see *Form No. 80*.

Where a defendant makes a counter claim against the plaintiff and a third party, for form of appearance for a third party served with such counter claim under *J. A., s. 16, s.s. 4, Rule 127*, see *Form No. 81*.

(a) It is assumed that this will be the practice; see however *Rule 50*.

Every appearance entered by a solicitor is to contain the name and address of the solicitor by whom it is entered, (*Rules 51, 52*), and a defendant appearing in person is to state that he appears in person, and is to state his address, and where such address is more than two miles from the office where the appearance is entered, the appearance is also to state another address for service of papers, not more than two miles from such office. (*Rules 51, 53.*)

If the address of the solicitor or of a defendant appearing in person be not given as above mentioned, the appearance is not to be received; and if the address given be illusory or fictitious, the appearance, on application by the plaintiff in Chambers, may be set aside, and the plaintiff permitted to proceed, by posting up the subsequent proceedings requiring service in the office from whence the writ issued. (*Rule 54.*)

A defendant appearing in person, is not bound to deliver his appearance in person, he may send it to the office by any third person he pleases.

The appearance when filed is to be entered by the officer in the Procedure Book. (*Rule 56.*) And it would seem that it must also be sealed by him with his seal of office. (*J. A. s. 51.*) (*a*).

Time for appearance.—An appearance may be entered at any time before judgment. (*Rule 61.*)

Appearance in Particular Cases.

Partners sued in the name of their firm.—Partners sued in the name of their firm are to appear individually in their own names, but all subsequent proceedings are to be continued in the name of the firm. (*Rule 57.*)

(*a*) *J. A. s. 51* requires the Local Officers therein named to seal "every writ, and other document," issued out of, or filed in, their offices.

Individual sued in the name of a firm apparently consisting of more than one person.—Where an individual is sued in the name of a firm apparently consisting of more than one person, he is to appear in his own name; but all subsequent proceedings are to be carried on in the name of the firm. (*Rule 58.*)

Two or more defendants.—Where two or more defendants appear at the same time and in the same action by the same solicitor, they are all to be included in one appearance. (*Rule 59.*)

Appearance by Landlord.—Any landlord although not named as a defendant in a writ of summons for the recovery of land, may, when his tenant is named as defendant, *without leave* appear and defend. He must, however, with his appearance file an affidavit stating that he is in possession of the land in question, either by himself or his tenant, as the case may be; and in case the possession is by his tenant, that the defendant named in the writ is his tenant. For form of affidavit see *Form No. 33.*

When any person, not named in the writ of summons as a defendant, desires to defend an action for the recovery of land, and is unable to make the affidavit abovementioned, he may obtain leave to appear and defend, on application in Chambers, on filing an affidavit showing that he is in possession of the land, by himself, or his tenant. (*Rule 63.*)

An appearance, entered for a landlord not named in the writ, is to state that the person so appearing appears as landlord. (*Rule 64.*) The appearance is to be entitled in the style of cause as given in the writ. (*Rule 65.*)

Notice of such appearance, must be given to the plaintiff or his solicitor (see *infra*), and thereafter the landlord is to be named as a party defendant in the action, in all subsequent proceedings.

Limited Defences.

Limited defence in actions for the recovery of money.—Where the defendant wishes to limit his defence to

the question of the amount to which the plaintiff is entitled;—he may either in his appearance, or by notice served within four days after appearance, state that he disputes only, the amount claimed by the plaintiff, and in such case he need not file any further defence for the purpose of disputing such amount, and the plaintiff is to proceed as if the defendant had filed a defence disputing the amount of the claim. (*Rule 68.*) For form of this notice when it is included in the appearance, see *Form No. 77*, and when filed after appearance, see *Form No. 15*.

In mortgage suits under the former practice in Chancery, a similar mode of defence was provided, but it was held that although the defendant might, under such a defence, shew that part of the plaintiff's claim was barred by the Statute of Limitations; *e. g.*, part of the interest claimed, (*Wright v. Morgan*, 1 App. R. 613), yet if he desired to set up the statute as a bar to the whole claim, he must specially plead it by answer. (*Ib.*, and see *Cattanach v. Urquhart*, 6. P. R. 28.)

This rule will probably still be followed, and until it is judicially decided that the notice limiting the defence will enable a defendant to set up any defence which will be a bar to the plaintiff's whole claim, it will be safer only to use it, where something is admitted to be due and only the *quantum* is in dispute.

Limited defence in actions for recovery of land.—A defendant may, in his appearance, limit his defence, (see *Form No. 78.*) Or when he has omitted to do so in his appearance, he may, if he desires, within four days after appearance, do so by serving a notice on the plaintiff's solicitor, if any, or, if none, then by *filing* it in the proper office entitled in the cause in the prescribed form (see *Form No. 14.*) with such variations as the case may require. (*Rule 66.*) This notice is apparently only required to be *filed* in cases where the plaintiff sues in person. (a) If the defence is not limited,

(a) See however *Rule 150.*

either in the appearance, or by a subsequent notice, the appearance is to be deemed an appearance to defend for the whole of the land claimed in the writ. (*Rule 66.*)

Notice of appearance, &c.

Notice of appearance, when necessary.—If the appearance be entered after the time limited for appearance has expired, or for a landlord who is not named as a defendant in an action for the recovery of land, notice of appearance, (*Form No. 13*), must be given to the plaintiff's solicitor, if any, or to the plaintiff, if he sue in person. If the notice be not given when requisite, the plaintiff may proceed as in case of non-appearance. (*Rules 61, 65.*)

Delivery of Defence.—Where the defendant appears after the time limited for appearance has expired, he is to be entitled to no further time for delivering his statement of defence, than if he had appeared in due time. (*Ib.*)

A defendant served out of the jurisdiction must, with his appearance, file his statement of defence. (*Rule 46, 150.*)

CHAPTER VII.

PROCEEDINGS IN DEFAULT OF APPEARANCE.

1. *Appointment of Guardian ad litem.*
2. *Allowance of service of Writ, when served out of the Jurisdiction.*
3. *Judgment in default of Appearance.*
 - I. *Actions formerly cognizable at law.*
 - (a) *Final Judgment in default of Appearance.*
 - (b) *Interlocutory Judgment in default of Appearance.*
 - II. *Actions formerly within the exclusive Jurisdiction of Chancery.*
 - (a) *Actions for Foreclosure, Sale, or Redemption.*
 - (b) *Actions for Administration, or Partition.*
 - (c) *Actions for an Account.*
 - (d) *Cases in which Motion for Judgment must be made.*

1. APPOINTMENT OF GUARDIAN *ad litem*.

Lunatics.—Where the defendant is a lunatic and has no committee, the plaintiff cannot proceed with the action until a guardian *ad litem* shall have been appointed. (*Rules 39, 60.*) Application may be made in Chambers by the defendant for the appointment of a guardian *ad litem*; but where no application is made on behalf of the lunatic defendant for the appointment, the plaintiff after the expiration of the time limited for appearance, may serve notice of motion, or, when the motion is before a County Court Judge, *Local Master*, obtain a summons (*Rule 425*), in Chambers for the appointment of a guardian *ad*

litem to the lunatic defendant, The notice of motion, or summons, must be served six clear days before the day named in the notice, or summons, for hearing the application, and must be served upon, or left at the dwelling house of, the person with whom, or under whose care, the lunatic defendant was at the time of serving the writ of summons. And the application must be supported by proof of the due service of the notice of motion, or summons, as the case may be, and also of the service of the writ of summons, and that the defendant is a lunatic, and has no committee, and that the time for appearance has elapsed, and that no guardian has been appointed before the notice of motion was served, or the application for the summons was made, as the case may be. (*Rule 69a*).

The case of a defendant who has been found by inquisition, or judicial declaration, lunatic, but who has no committee, is not expressly provided for by the Act or *Rules*, but it would appear necessary in such a case, that the procedure above prescribed should be adopted for the appointment of a guardian *ad litem*, before further proceedings can safely be taken by the plaintiff in the action, whether an appearance has been entered, or not.

Infants.—In some cases, as we have seen, an infant defendant must be personally served with the writ of summons (*Rule 37*, and see *ante* p. 54); and wherever he is personally served, he may apply in Chambers for the appointment of a guardian *ad litem*, at any time before the expiration of seven days after the time limited for appearance. If the infant defendant does not procure a guardian to be appointed before the expiration of the seven days, the plaintiff may serve a notice on the *Official Guardian* styled in the cause, to the effect that the infant was served with the writ of summons (stating the day of service), and that seven days have elapsed since the time limited for appearance expired, and that no guardian *ad litem* has been appointed, whereupon the *Official Guardian* becomes *ex officio* guardian *ad litem* of such infant. (*Rule 70*.)

No order for the appointment of a guardian *ad litem* to an infant defendant, is any longer necessary, except where the application is made on behalf of the defendant, or where the plaintiff desires that some other person than the *Official Guardian* may be appointed, *e. g.* where there are two classes of infants having conflicting interests. Provision being made for serving the *Official Guardian* with a copy of the writ at the time when the infant is served, (see *ante* p. 54), service of any further copy seems unnecessary.

Where the infant defendant is not required to be served personally with the writ, service of the writ of summons on the *Official Guardian* as mentioned, *ante* p. 54, constitutes the latter *ex officio* guardian *ad litem* of such infant, and no further appointment is necessary. The application to appoint a guardian *ad litem* to a lunatic, or infant, defendant, when made by himself, is *ex parte*, (see *Chy. O.* 526); when made by the plaintiff it must be on notice to the defendant, and the person under whose care he resides.

Person to be appointed Guardian.

When the application is made for the appointment of a guardian *ad litem* to a lunatic, or an infant, defendant, the *Official Guardian*, or some other proper person, may be appointed. (*Rule 69.*)

2. ALLOWANCE OF SERVICE OF WRIT, WHEN SERVED OUT OF THE JURISDICTION.

Where a writ has been served out of the jurisdiction, and the defendant has not appeared; before the plaintiff can take any further proceedings in the action, it is necessary for him to apply in Chambers for an order allowing the service. (*Rule 48.*) Applications of this kind must be made at Toronto, and cannot be made to any *Local Master* or County Court Judge. (*Rule 422.*)

What necessary to be proved.

On an application for the allowance of service out of the jurisdiction, affidavits must be adduced to prove:—

1. The due service of the writ, or notice of the writ, on the defendant, and of the indorsement of the date of service by the person effecting service, as required by *Rule 44*. It will probably be also necessary to state facts establishing the identity of the person served with the defendant named in the writ.

2. And either :—

- (a) That the whole or some part of the subject matter of the action is land, stock, or other property situate within Ontario, or is some act, deed, will, or thing, affecting such land, stock, or property.
- (b) *Or*, that the action is brought to enforce, rescind, dissolve, annul, or otherwise affect, or to recover damages, or other relief, for the breach of, a contract entered into within Ontario.
- (c) *Or*, that the action is brought in respect of a breach within Ontario, of a contract whenever made.
- (d) *Or* that the action is brought to restrain, or remove, or recover damages in respect of, some act, or thing, which was, or is to be, done, or is situate, within Ontario.
- (e) *Or*, that the defendant has assets in Ontario of the value of \$200 at least, which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action. (*Rule 45*).

If a defendant served out of the jurisdiction does not appear, the Court, or Judge, is to give such direction as the Court, or Judge, from time to time sees fit, as to the manner of proceeding in the action, and the conditions on which the same may be proceeded with: and the plaintiff before obtaining judgment must prove his claim, and the amount of debt, or damages, if any, to the satisfaction of the Court,

or Judge, and in such mode as the Court, or Judge, having reference to the nature of the case, may direct. (*Rule 55 e.*)

3. JUDGMENT IN DEFAULT OF APPEARANCE.

The scheme of procedure laid down by the English Rules was thus summarised by Sir George Jessel, M. R., in *Dymond v. Croft*, 2 Ch. D. 412: "The scheme of the Rules is this: in what may be called common law actions, such as actions for debt, or recovery of land, if a defendant does not appear, the plaintiff is to have judgment just as he had before the Judicature Acts came into operation. But in cases assigned to the Chancery Division, this cannot be done, because these cases are of so complicated a nature that the intervention of the Court is necessary in order to determine what the proper order is. Therefore, instead of allowing the plaintiff to sign judgment, as in cases of debt, and ejectment, it is provided by Order XIII., r. 9, that in actions assigned to the Chancery Division, and also in probate actions (for of course you could not allow a man to prove any will he might choose to set up) if the party served with the writ does not appear, the action may proceed as if he had appeared. Then, in order to avoid the necessity of obtaining an order for substituted service every time a step is taken in the cause, Order XIX., r. 6, provides that if no appearance is entered for any party, any pleading, or document, required to be delivered to him, shall be delivered by being filed with the proper officer, so that if the party who does not appear wishes to know what is being done, he must go to the office and find out. The object of that is not to put the plaintiff to trouble—for in dealing with an absent defendant he ought not to be put to any unnecessary trouble—but in order to see that the proper order is made."

These observations are in the main applicable to the procedure under the Ontario Act with the qualification rendered necessary by the fact that the Chancery Division

in Ontario has no exclusive jurisdiction ; what is said with reference to cases within the exclusive jurisdiction of the English Chancery Division, must be understood here to apply generally to cases, which were formerly within the exclusive jurisdiction of the Court of Chancery, and in respect of which no particular mode of procedure is laid down by the *Rules*.

In considering the proceedings which may be taken in default of appearance, it will be convenient to discuss the subject, first as regards actions formerly cognizable at law, and second as regards actions formerly within the exclusive jurisdiction of the Court of Chancery.

1. *Actions formerly cognizable at law.*

In some actions of the class formerly cognizable at law, where no appearance is entered, the plaintiff may at once obtain final judgment against the defendant ; in other cases he can, in the first instance, only obtain an interlocutory judgment, and in such cases he must proceed to get his damages assessed, or ascertained, before he can obtain final judgment. An interlocutory judgment merely establishes the right of the plaintiff to recover something, but leaves the amount he is entitled to recover, to be ascertained by a subsequent proceeding. Upon a final judgment, execution may issue, but no execution can be issued on an interlocutory judgment.

Before proceeding, we may notice that formerly at Common Law the only actions in which a final judgment could be obtained for default of appearance, were those where the writ had been specially indorsed, or actions of ejectment where no appearance at all had been entered. The *Judicature Act*, allows final judgment to be obtained in both of these cases, and also in some others, *e. g.*, in actions where there are several defendants, and the writ has been specially indorsed, and some of the defendants appear, and others do not, final judgment may now be obtained against the non-appearing defendants, without prejudice to the

plaintiff proceeding with the action, against the defendants who have appeared ; also in actions to recover land, when a limited defence is put in, judgment may be at once obtained for the recovery of the part for which no defence is made. (*Rule 76.*) So also where the plaintiff has joined in an action for the recovery of land, a claim for *mesne* profits, or for arrears of rent, or for damages for breach of contract relating to the land in question, and no appearance is entered, or where a limited defence is made as to the land, the plaintiff is at liberty at once to sign final judgment for the whole, if there be no appearance, or for the part of the land for which no defence is made, and proceed with the action as to the other claims. (*Rule 77.*)

(a) *Final Judgment in Default of Appearance.*

Where writ of summons is specially indorsed.—Where the action is brought in respect of any of the causes of action entitling the plaintiff to specially indorse his writ under *Rule 14* (see *ante* p. 46), and the writ has been so indorsed, he may, in default of appearance, enter final judgment for any sum *not exceeding* the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs ; but execution cannot be issued until after eight days from the last day for appearance. (*Rule 75.*)

Where there are several defendants, and some appear and others do not, and the writ has been *specially indorsed*, final judgment and execution may be obtained as above, against the defendants who have not appeared, without prejudice to the plaintiff's right to proceed against those who have appeared (*Rule 73*) ; formerly in such a case the plaintiff could only enter an interlocutory judgment against the non-appearing defendants, and would have to wait to enter final judgment, until he had either obtained judgment or abandoned his claim, against the defendants who appeared.

Practical Directions.—Prepare a judgment roll (see *Form No. 77*,) an affidavit of service of the writ of summons, an affidavit of non-appearance, of payment of fees and mileage for service of writ, and a bill of costs. When the writ has been served out of the jurisdiction, it will be necessary also to produce the order allowing the service, and giving the plaintiff leave to proceed (*Rule 48*), and also proof of the plaintiff's claim as required by the order. These papers are to be taken to the office of the Registrar of the Division, if the writ issued in Toronto, (a) and in all other cases to the officer by whom the writ was issued. If the judgment is to be entered at Toronto, obtain from the officer who is to enter judgment a requisition to one of the taxing officers to tax the costs; attend the taxing officer and obtain his certificate, and on producing it to the officer who gave the requisition he will compute the interest and fill in the amount of the costs, and sign the judgment. Under the English practice the judgment may be signed before the costs have been taxed, and the amount of the costs may be subsequently filled in on production of the certificate of taxation, and the same practice will probably be adopted here. The forms of judgments given in the Appendix to the *Rules* appear to indicate that a judgment may be so entered. Where the judgment is to be entered in an outer County, the local officer will himself tax the costs.

Proceedings where Plaintiff has omitted Special Indorsement.—If the plaintiff omits to indorse the writ specially in a case in which the writ could have been specially indorsed, (see *ante* p. 46,) and the defendant does not appear, the plaintiff may file and serve on the defendant a statement of the particulars of his claim (*Rule 61*). The service may be effected by posting the particulars up in the office from whence the writ issued (*Rule 131*); and if, at the expiration of eight days thereafter, the defendant have not appeared and filed a statement of defence (*Rule 51*), the plaintiff may enter final judgment for a sum not exceeding the amount indorsed on the writ, besides costs. No extra

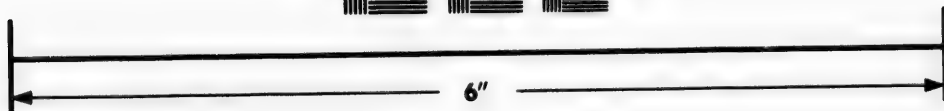
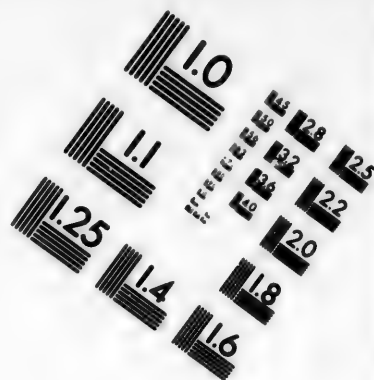
(a) See *ante* p. 58; and see *Rule 50*.

costs, occasioned by omitting the special indorsement, are to be allowed the plaintiff, unless the taxing officer be satisfied there was good reason for omitting it. (*Rule 74.*)

Actions for recovery of land.—Where no appearance is entered, or the defence is limited to part of the land claimed, the plaintiff, on filing the writ, and affidavits of service thereof and of non-appearance, or an affidavit that a limited defence as to part has been filed, is entitled to enter final judgment for the recovery of the whole, in case of non-appearance, or for the part for which no defence is entered, where the defence is limited, (*Rule 76*); and this may be done in actions for the recovery of land where the plaintiff has joined therein, a claim for *mesne* profits, arrears of rent, or damages for breach of contract relating to the land (*Rule 77*); and in such a case he may proceed as to the other causes of action, as if the action were brought for them alone: *e. g.* if no appearance has been entered he may sign interlocutory judgment as to such other claims, and proceed to assess the damages, as in other cases where interlocutory judgment is entered. Or if an appearance has been filed, but the defence is limited as to part of the land, he must, where necessary, deliver a statement of claim in respect of the part of the land for which defence is made, and the other causes of action, and proceed to a trial in the ordinary course.

For form of judgment for recovery of land alone, on default of appearance, see *Form* No. 149; and when a claim for damages is joined therewith, see *Form* No. 151. These forms may be so modified, as to apply where the defence as to the land is limited.

Costs.—Under the former practice at law it was necessary, in actions of ejectment, where the defendant did not appear, in order to recover costs against him, to file, on entering the judgment, either an affidavit that the party served with the writ, was at the time of its issue in actual adverse possession of the land, or else a rule of Court, or



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Judge's order, allowing the plaintiff to sign judgment as well for costs as for recovery of possession of the land. (See *R. S. O. c. 51 s. 20 sub-s. 2.*) The *Judicature Act* does not appear to make any special provision to the contrary, and it is therefore to be presumed that the same procedure will continue. (See *J. A. s. 12*).

(b) Interlocutory Judgment in default of appearance.

In all actions where the plaintiff's claim is for the detention of goods, or for pecuniary damages, or both, and the claim is not a liquidated demand for which a writ may be *specially* indorsed ; where no appearance is entered, the plaintiff on filing the writ, with an affidavit of due service thereof, and of non-appearance, may enter interlocutory judgment, and proceed to assess his damages "as hitherto." No statement of claim in such cases appears to be necessary. The damages may be assessed now, either at the Assizes, or in the County Court of the County where the action is brought, if the solicitors for all the parties reside in that County ; or the plaintiff may apply in Chambers for an order that the damages may be ascertained in any other way in which any question arising in an action may be tried, (*Rule 75.*) *e. g.*, by reference to an *Official Referee* (*J. A. s. 47*) or to the *Master of the Supreme Court*, or one of the *Local Masters*.

No express provision appears to be made by the *Judicature Act* for cases where some defendants appear, and others do not, in actions of the class above enumerated, the same rule will therefore prevail as formerly prevailed at law, and the plaintiff will be at liberty to enter interlocutory judgment against the non-appearing defendants, and then proceed with his action in the ordinary way against the other defendants, and at the trial assess his damages against those of the defendants, as to whom interlocutory judgment has been signed.

Where there are several defendants, if some let judgment go by default, and others plead to issue, the jury who try the issue should, unless it be otherwise directed, assess the damages against all the defendants.

Where all the defendants suffer judgment by default, and the amount of damages is substantially a matter of calculation, application may be made for a reference to compute the damages under *R. S. O. c. 50, s. 197*.

Entry of Judgment.—The form of judgment must be prepared by the solicitor, and delivered to the officer from whose office the writ issued, except in Toronto, in cases pending in the Queen's Bench, and Common Pleas, Divisions, in these cases the judgment must be delivered to the Registrar of the Division. (a) The officer must enter it at full length in a book to be kept for the purpose, (*Rule 325*), and must also, it would seem, in the outer offices, seal it with the seal of the office. (*J. A. s. 51*.) It is the duty of the officer, to examine all affidavits and papers required to be filed, or produced, and see that the same are regular and contain all that by law is required. (*Rule 328*.)

II. ACTIONS FORMERLY WITHIN THE EXCLUSIVE JURISDICTION OF THE COURT OF CHANCERY.

In the class of cases formerly within the exclusive jurisdiction of the Court of Chancery, there are some in which final judgment can be obtained on *præcipe*; others in which a motion for judgment must be made in Chambers; and others in which a motion for judgment must be made to the Court.

(a) *Actions for foreclosure, sale, or redemption.*

Where the defendant, not being an infant, does not appear, the plaintiff on filing a *præcipe* and an affidavit of service of the writ, and of non-appearance, is to be entitled to a judgment as claimed by the writ. For forms of judgment in such cases, see *Forms Nos. 168, 169, and 170*. It must be remembered that the *Forms Nos. 168 and 169* are not applicable indiscriminately to every mortgage suit for foreclosure or sale, but must be modified by the officer to suit each particular case. The form of the

a See ante p. 58; and see *Rule 50*.

judgment will depend on the indorsement on the writ of summons. For forms of indorsement see *Form No. 9 d, e, and f*. When either the claim for payment, or for delivery of possession, is omitted from the indorsement on the writ, the corresponding clause, ordering payment, and delivery of possession, must be omitted from the judgment. The plaintiff cannot get any greater relief by the judgment than he has claimed by his writ. Neither can the judgment be granted on *præcipe* where the plaintiff claims any special relief, the granting of which is discretionary with the Court, such as immediate foreclosure, or sale, without naming any day for redemption, nor where there are infant defendants. In these cases it is necessary for the plaintiff to move for judgment. (See *post* p. 129.)

Under the former practice in Chancery the decree to be pronounced on *præcipe* was to be to the same effect as would have been pronounced by the Court, on a hearing *pro confesso*. (*Kirkpatrick v. Howell*, 22 Chy. 94.)

With whom præcipe to be filed.—In Toronto the *præcipe* is to be filed with the Registrar of the Division in which the writ issued, and in all other cases with the officer by whom the writ was issued. (*Rule 78*.)

Practical directions.—Where the action is for foreclosure, or sale, and no reference is required as to encumbrances, of which fact the solicitor must first satisfy himself, take the writ of summons and the affidavit of service thereof, and an affidavit proving the claim, in case the writ has not been personally served, (*Chy. O. 646*.) with a bill of costs, to the proper officer (*a*). Having examined these papers, and found them sufficient, he will in Toronto give you a requisition to tax your costs, or in the outer counties himself tax them; the amount due to the plaintiff at the date of the judgment, on the basis of the indorsement on the writ, will be computed by the officer, and also the further interest due for six calendar

(a) It is possible that an affidavit of non-appearance will also be required, but no affidavit of this kind was formerly necessary in Chancery.

months, and the proper amounts inserted in the judgment. Care must be taken to see that the day named for redemption does not fall on a Sunday, or other bank holiday. Six calendar months from the taking of the account is the period usually allowed for redemption.

In actions for redemption, and in actions for foreclosure, or sale, where a reference as to encumbrances is required, the writ, and affidavit of service, and of non-appearance (*a*), are all the papers that usually need be produced on filing the *præcipe* for judgment, but where the writ has not been personally served there must also be filed an affidavit proving the plaintiff's claim, (*Chy. O.* 646), and where it has been served out of the jurisdiction there must also be filed the order allowing service and authorizing the plaintiff to proceed, (see *ante* p. 65.) The judgment must be entered by the officer at full length in the book for entering judgments. (*Rule* 325.) Where the writ of summons is issued in an outer county, the judgment must be sent to Toronto to the Registrar of the Division in which the action is pending, for entry. (*Rule* 418, *Chy. O.* 650.)

Whether a defendant in an action for foreclosure can, by paying into Court \$80, according to the former practice in Chancery, secure a judgment for the sale of the mortgaged property, appears to be doubtful.

(*b*) *Actions for Administration, or Partition.*

Rule 78 provides that judgment may also be granted for administration, or partition, on *præcipe* "on such evidence, if any, and in such cases as nearly as may be, as provided for by the present practice of the Court of Chancery in that behalf:" but this provision appears to be nugatory, as there was no practice of the Court of Chancery authorizing the granting of such decrees on *præcipe*. Decrees for administration might in certain cases be granted on a summary application in Chambers, without a bill being filed, by a Judge, the Referee in Chambers, (*Chy. O.* 467, 560,) or a Local Master, (*Chy. O.* 638,) and decrees for

(*a*) See p. 74, note (*a*).

partition might, in like manner, be granted by a Judge, or a Local Master, (*Chy. O.* 640,) and this method of procedure is continued and extended to all the Divisions. (*Rule 3.*) But the power to grant decrees for administration, and partition, was always a judicial act, and was confined to the Judges, and *quasi* judicial officers of the Court, and was not extended to mere ministerial officers such as the Registrar, and Deputy Registrars.

(c) *Actions for an Account.*

It would seem intended that in all actions for an ordinary account, *e. g.*, in any case in which a partnership, or executorship, or ordinary trust, account is claimed, where the plaintiff desires to have an account taken in the first instance, and the action has been commenced by writ, which has been indorsed with a claim that such account be taken as provided by *Rule 16*, (see *Form No. 9 c.*); the plaintiff in default of appearance, and even after appearance, may move in Chambers for an order that such account be taken, and unless the defendant by affidavit, or otherwise, satisfy "the Court, or a Judge" that there is some preliminary question to be tried, an order for the account claimed, with all directions usual according to the former practice of the Court of Chancery in similar cases, is to be forthwith made. (*Rule 86.*)

The application in such cases is to be made on notice, and supported by affidavits filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. (*Rule 87.*) Under the corresponding English rule the ordinary administration order has been granted. (*Bell v. Lowe*, W. N. 1875, 229.)

(d) *Cases in which motion for judgment must be made.*

In all actions formerly within the exclusive jurisdiction of the Court of Chancery, except those which have been already referred to in this chapter, on default of appearance a motion for judgment will have to be made in Court similar to the former practice of the Court of Chancery in reference to the hearing of causes *pro confesso*. (*Rule 315.*)

The English Order XIII. r. 9, expressly provides that, in actions assigned to the Chancery Division, if the defendant served with the writ does not appear, the action may proceed as if he had appeared; which, of course, implies that a statement of claim must be delivered. This rule, however, does not appear to have been re-enacted in Ontario, it is presumed because there are in Ontario no particular actions assigned to the Chancery Division; at the same time, the class of cases which was formerly within the exclusive jurisdiction of the Court of Chancery needs a special provision for the reason pointed out in the remarks of Sir Geo. Jessel, already quoted (see *ante* p. 67), and the omission of some modification of the English order seems a defect in the *Rules*. Rule 315 provides, "Except where, by the Act, or by these rules, it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment." But the preliminary steps to a motion for judgment in default of appearance, are not clearly laid down in the *Rules*. It seems tolerably clear, however, that in order to enable the Court to pronounce judgment, it will be necessary in most cases to file a statement of claim according to the English practice. In cases, therefore, where, in default of appearance, a motion for judgment will be necessary, it may often prove a saving of time, for the plaintiff to serve his statement of claim with the writ of summons. (*Rule 158 c.*)

Having served his statement of claim with the writ, if no defence be filed before the lapse of eight days from the last day for appearance, where the defendant has been served within the jurisdiction (*Rule 160*), or at the expiration of the time for appearance, where the defendant has been served out of the jurisdiction (*Rule 46*),—the plaintiff will be in a position to move for judgment in default of defence.

Where, however, the statement of claim has not been delivered with the writ of summons, it is to be filed in the proper office, and service of it on the defendant may be effected in all cases where he has not appeared, by posting up a copy in the office. (*Rule 131.*)

CHAPTER VIII.

PROCEEDINGS AFTER APPEARANCE.

1. *When writ specially indorsed.*
2. *In actions for an account.*
3. *In actions for foreclosure, or sale, where dispute note filed.*
4. *Other actions.*

1. WHERE WRIT SPECIALLY INDORSED.

Notwithstanding an appearance has been entered, the plaintiff may, where his writ has been *specially indorsed*, move in Chambers that the defendant do shew cause why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. The application must be on notice to the defendant, returnable not less than two clear days after service, if made in Toronto, (*Rule 81*.) and if made to a *Local Master*, or County Court Judge, then on summons, returnable in like manner (*Ib.* and *Rule 425*). The application must be supported by an affidavit made by the plaintiff, or any other person (who can swear positively to the debt or cause of action), verifying the cause of action and stating that in his belief there is no defence to the action. (For form of affidavit see *MacLennan*, 133, *Chitty's Forms*, 11th ed., 100.) A copy of the affidavit is to be served with the notice of motion, or summons. (*Rule 80*.)

Unless the defendant can satisfy the Court, or Judge, by affidavit, or otherwise, that he has a good defence on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend the action, an order may be made empowering the plaintiff to sign judgment. (*Ib.*) For form of judgment in such case, see *Form No. 153*.

The defendant may shew cause against such application, by shewing he has a defence on the merits, and offering to bring the sum indorsed on the writ into Court (*Crump v. Cavendish*, 5 Ex. D. 211), or by affidavit of merits alone. In such affidavit he must state whether the defence he alleges goes to the whole, or part only, and if to part, then to what part, of the plaintiff's claim; and the Judge may, if he think fit, order the defendant to attend and be examined upon oath, or to produce any books or documents, "or copies of or extracts therefrom." (*Rule 82.*) The affidavit must be made by the defendant, where the defendant is capable of making one, (*Muirhead v. Direct U S. Cable Co.*, 27 W. R. 708; *Shelford v. Louth, & E. C. R. W. Co.*, 4 Ex. D. 317.) A Corporation aggregate must procure an affidavit to be made (*Ib.*) The affidavit must disclose the defence. The filing of affidavits in reply on such an application is not a matter of right, (*Rotherham v. Priest*, 49 L. J. C. P. 104, W. N. 1879, 190.) but may be allowed in the discretion of the Judge. Where a defendant was not personally liable for the debt, *e. g.* where the debt sued for was one contracted by the defendant while a married woman, the order for judgment was refused. (*Ortner v. Fitzgibbon*, 43 L. T. 60.)

Defence to part of claim.—Where the defence set up applies only to part of the plaintiff's claim, or any part of the claim is admitted to be due, the plaintiff is to have judgment forthwith as to such part which is admitted, or as to which no defence is made, subject to such terms as may be imposed as to suspending execution, or paying the amount levied, or any part thereof, into Court by the Sheriff, or as to the taxation of costs, or otherwise, as the Judge may think fit, and the defendant may be allowed to defend as to the residue of the claim. (*Rule 83.*)

If it appears to the Judge that any defendant has a good defence to the action, or ought to be permitted to defend, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be

permitted to defend, and the plaintiff is to be entitled to enter final judgment against the latter, and issue execution thereon, without prejudice to his right to proceed with his action against the defendant who is allowed to defend. (*Rule 84.*) Leave to defend may be given unconditionally, or subject to such terms as to giving security, or otherwise, as the Court, or Judge, may think fit. (*Rule 85.*)

The following have been held to be meritorious defences, viz; the Statute of Limitations; Usury; Infancy; that the claim is not one that can be specially indorsed; want of Jurisdiction. (*Muelennan*, 126.)

Leave to sign final judgment will not be granted unless the case is free from doubt. The simple dismissal of the plaintiff's motion will be equivalent to leave to defend. (*Ib.* 135.) If the order giving the defendant leave to defend does not name any other time, he must deliver his defence within eight days after the order, (*Rule 162.*) or judgment may be obtained by default even though no statement of claim is delivered, (*Atkins v. Taylor*, W. N. 1876, 11; *Margate Pier Co. v. Perry*, *ib.* 52). *Sed quere* if this is so, where the defendant has not dispensed with the delivery of a statement of claim, (see *Charley's Jud. Act*, 3rd ed. p. 523.) Leave will be given to defend unconditionally where a good defence is shown. (*Runnacles v. Mesquita* 1 Q. B. D. 416).

Leave to defend, on payment of claim into Court, will be granted where it is not clear that there is a defence, but the defendant shows such a state of facts, as leads to the inference that at the trial he may be able to establish a good defence. (*Ray v. Barker*, 4 Ex. D. 279.)

A defendant who has paid money into Court, if successful in the action, is entitled to have it paid out to him, notwithstanding notice of appeal has been given. (*Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 213).

2. ACTIONS FOR AN ACCOUNT.

We have already seen that where the action is for an ordinary account, *e. g.*, a partnership, executorship, or trust account, and the writ has been indorsed under *Rule 16*, (see *Form No. 9, a, b, c.*) notwithstanding an appearance has been entered, the plaintiff may move, without delivering a statement of claim, for an order directing the taking of the account. (See *ante* p. 76.)

3. ACTIONS FOR FORECLOSURE, OR SALE, WHERE DISPUTE NOTE FILED.

In actions of this class, where an appearance has been entered, and the defendant has merely filed a notice disputing the amount claimed to be due, (see *Form No. 15.*) it will not be necessary for the plaintiff to deliver a statement of claim, but he may apply on *præcipe* for judgment in accordance with the indorsement on the writ, as in case of non-appearance, but the defendant must receive four days' notice of the taking of the account, whether it be taken by the officer entering the judgment, or by a Master to whom the cause is referred.

4. OTHER ACTIONS.

In all other actions where the defendant has appeared, and has not dispensed with the delivery of a statement of claim (*Rule 126*), the plaintiff must file (*Rule 150*) and serve (*Rules 126, 131*) a statement of claim;—except, (perhaps,) in cases where the defendant has obtained leave to defend an action in which the writ has been *especially indorsed*, and no express provision has been made for the delivery of a statement of claim by the order allowing him to defend, (*Atkins v. Taylor*, W. N. 1876, 11; *Margate Pier Co. v. Perry*, *Ib.* 52.) but see *ante* p. 80.

Copy of writ to be filed, when statement of claim dispensed with.—Where the defendant dispenses with the delivery of a statement of claim, a copy of the writ of summons and indorsements must be filed. (*Rule 158.*)

Time for filing statement of claim, or writ.—The statement of claim must be filed and served, or the copy of the writ of summons and indorsements must be filed, within three months from the time of the defendant's entering his appearance, unless otherwise ordered, (*Rule 158.*)

Consequence of not filing statement of claim, or writ.—Defendant may move to dismiss the action, with costs, for want of prosecution, where a statement of claim is not delivered within the proper time (*Rule 203*); but no express provision is made in the *Rules* for his doing so, for default in filing a copy of the writ, but it is to be presumed that the filing of the copy of the writ is intended as a substitute for the statement of claim (*Rule 158*), and the omission to file a copy within the prescribed time, where necessary, would subject the plaintiff to the same penalty.

Enlarging time for filing Statement of Claim.—Where the plaintiff is in a position to deliver a statement of claim against one of several defendants, but not against the others, he should, if required to deliver a statement by that one defendant, obtain time to do so, until he is in a position to deliver a statement of claim against all.

CHAPTER IX.

PLEADINGS.

1. *Nature of Pleadings in an Action.*
2. *Rules of Pleading :—*
 - (a) *Rules applicable to all Pleadings.*
 - (b) " " *Statement of Claim.*
 - (c) " " *Statement of Defence, and
Subsequent Pleadings.*
3. *Filing, and Service, of Pleadings.*
4. *The Statement of Claim :—*
 - (a) *Form of Statement of Claim.*
5. *Defence, how made.*
 - (a) *Statement of Defence, and Counter Claim.*
 - (b) *Dispute Note.*
 - (c) *Notice to Third Party, liable to defendant
for contribution, &c.*
6. *Proceedings after Delivery of Statement of Defence.*
 - (a) *Cases in which Judgment may be obtained on
Præcipe.*
 - (b) *Motion for Judgment.*
 - (c) *Discontinuance.*
 - (d) *Confession of Defence.*
 - (e) *Reply.*
7. *Reply by Third Party.*
8. *Demurrer.*

1. NATURE OF PLEADINGS.

Under the new procedure the ordinary pleadings in an action, are three in number, and consist of :—

1. The statement of claim.
2. The statement of defence, set off, or counter-claim.
3. The reply.

There may also be a joinder of issue, (*Rule 174.*) but no pleading subsequent to a reply, except a joinder of issue can be pleaded without the leave of the Court, or a Judge. (*Rule 174.*)

Questions of law arising on the pleadings, may be raised by demurrer as formerly.

Formerly, there were no pleadings delivered in actions of ejectment, but now pleadings are to be delivered in actions for the recovery of land in the same manner as in other actions.

2. RULES OF PLEADING.

(a) General Rules applicable to all Pleadings.

May be printed, or written.—Every pleading may be printed, or written, or partly printed, and partly written. No more than four copies of any pleading or other document, exclusive of the draft, are to be allowed. (*Rule 129.*) If more than three copies, exclusive of the draft, are required of any pleading, or other document, it may be printed, in which case 30 cts. per folio, and the cost of printing, will be allowed therefor. (*Rule 130.*) If printed, the pleading or other document must be printed with pica type, leaded, and on good paper of foolscap size. (*Rule 452.*)

To contain date, and style of cause, &c.—Every pleading is to bear on its face the date of filing, and the name of the Division to which the cause is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor, and agent, if any, of the party filing the same, or the name and address of the party filing the same if he does not act by a solicitor. (*Rule 132.*)

To contain Concise Statement of Facts, &c.—Every pleading is to contain as concisely as may be, a statement of the material facts on which the pleader relies, but not the evidence by which they are to be proved. Such statement is to be divided into paragraphs numbered consecutively, and each paragraph is to contain as nearly as may be a separate allegation: dates, sums, and numbers, are to be expressed in figures and not in words; the signature of counsel is unnecessary; similar forms to those in the appendix of *Forms* to the *Rules* may be used. (*Rule 128*).

The pleader must allege all facts, and grounds of claim, or defence, on which he intends to rely, unless they appear in some previous pleading. (*Rule 147*.)

Facts presumed in favour of pleader, or as to which onus is on opposite party.—The pleader need not allege any matter of fact which the law presumes in his favour, nor as to which the burden of proof lies upon the other side, unless the same has first been specifically denied, *e. g.* the consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim. (*Rule 139*.)

Documents, contents of, how to be stated.—When the contents of any document are material, it is sufficient in any pleading, to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document, or any part thereof, are material, (*Rule 135*.) *i. e.*, to the question in controversy in the action.

Allegations of Fraud, Malice, Intention, &c.—When it is material to allege malice, fraudulent intention, or other condition of the mind of any person, it is sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred. (*Rule 136*.)

Notice.—Where it is material to allege notice to any

person of any fact, or thing, it is sufficient to allege such notice as a fact, unless the form, or the precise terms of such notice, is material. (*Rule 137.*)

Implied Contract, &c.—When any contract, or relation between any persons, is to be implied from a series of letters, or conversations, or otherwise, from a number of circumstances, it is sufficient to allege such contract, or relation, as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail; and if in such a case the pleader desires to rely in the alternative upon more contracts, or relations than one, as to be implied from such circumstances, he may state the same in the alternative. (*Rule 138.*)

Denial of representative character.—If the pleader wishes to deny the right of any party to claim as executor, trustee, or in any representative, or other alleged capacity, or the alleged constitution of any partnership firm, he must do so specifically, or the same will be taken to be admitted. (*Rule 140.*)

Effect of bare denial of contract.—A bare denial of a contract only puts in issue the fact of the making of the contract, but not its legality or sufficiency in law, whether with reference to the Statute of Frauds, or otherwise. (*Rule 141.*) Wherever, therefore, the Statute of Frauds, or any other statute, is relied on as invalidating a *de facto* contract, it will be necessary to set up the statute specifically in the pleading.

Issue may be directed, where pleadings defective.—Where the pleadings do not sufficiently define the issues of fact in dispute, a Judge may direct issues to be prepared, which are to be settled by him in case the parties differ. (*Rule 177.*)

Close of pleadings.—The pleadings are closed on the filing of a joinder of issue to the last pleading of the opposite party; or in case no joinder of issue be filed, then when the time

for amendment of the pleadings, or the delivery of any further pleadings under the *rules*, or any special order, shall have expired. (*Rule 176.*) As to when time for amendment expires, see *post* chapter xx.

(b) *Rules Applicable to Statement of Claim.*

Place of Trial.—The plaintiff is, in his statement of claim, to name the county town in which he proposes the action shall be tried, and the action is to be tried there unless otherwise ordered. (*Rule 254.*) In actions for the recovery of land, the place of trial must be in the county in which the land is situate; in other actions the plaintiff may name any place he pleases. The place of trial, however, is in the discretion of the Court, or a Judge, but will not be changed from the place named by the plaintiff unless the defendant shew a preponderance of convenience in favour of some other place (*Plum v. Normantown Iron Co.*, W, N. 1876, 105), or that a fair trial cannot be had at the place named by the plaintiff (*Blackburn v. Cameron*, 5 Pr. R. 34; but see *Roche v. Patrick*, 5 Pr. R. 210.)

Relief to be specially claimed.—Every statement of claim is to state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. If the plaintiff's claim be for discovery only, the statement of claim must shew it. (*Rule 133.*) No relief can be granted at all, unless it is either specifically prayed for, or there is a prayer for general relief, under which it can be granted (*Holloway v. York*, 25 W. R. 627.) Where general relief is prayed, a pleading will not be demurrable if the facts stated shew the pleader entitled to any relief (*Watson v. Hawkins*, 24 W. R. 884; *Phillips v. Royal Niagara Hotel Co.*, 25 Chy. 358). Under a prayer for general relief, the Court will grant the appropriate relief which the facts stated warrant, although unable to grant the specific relief claimed. (*Slater v. The Canada Central R. W. Co.* 25 Chy. 363).

Joinder of different causes of Action.—Where several distinct causes of action, founded upon separate and distinct

facts, are joined in one action, the plaintiff is to state them as far as may be, separately and distinctly. (*Rule 134.*)

New assignment.—Facts which, under the former system of pleading at law, were alleged by way of new assignment, are now to be pleaded by amending the statement of claim. (*Rule 143.*)

(c) *Rules applicable to Statement of Defence, and subsequent Pleadings.*

Silence of Pleading, effect of.—Save as is otherwise provided, *i. e.*, by the *Rules* requiring the specific denial of the representative character in which any person claims (*Rule 140*), and the express allegation of illegality, or insufficiency in law, of any contract alleged (*Rule 141*); the silence of a pleading as to any allegation in a previous pleading, is no admission of its truth; and allegations introduced into a pleading for the purpose of preventing such admissions being implied, and not for the purpose of making intelligible the grounds of defence, are impertinent. (*Rule 148; Chy. O. 123; Patric v. Sylvester, 23 Chy. 578.*) (a)

Admissions.—Each party is to admit such of the material facts in his adversary's pleadings as are true. (*Rule 240.*) Admissions are, where it is practicable, to be by reference to the numbers of the paragraphs in the pleadings to which they relate. They may be absolute or qualified (*Rule 146*); and when the Court or Judge, shall be of opinion that any allegation of fact, denied, or not admitted, by either, or any party, ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied, or not admitted. (*Rule 163.*)

Facts, and grounds of Defence, or reply, relied, on to be alleged.—The pleader must allege all such facts not appearing in a previous pleading, if any, as he means to rely on, and must raise by his pleading all such grounds of defence

(a) The English Rules differ in this respect, and thereunder a party is presumed to admit such allegations in any previous pleading as he does not deny. (*O. XIX. r. 17, 20, 22.*) See, however, *Rules 163 and 240.*

or reply, as would, if not pleaded, be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, *e. g.*, fraud, the Statute of Limitations, or a release of the claim. (*Rule 147.*)

Facts inconsistent with previous pleading.—No new ground of claim, or allegation of fact, inconsistent with the previous pleading of the pleader, can be set up, except by way of amendment of his previous pleading. (*Rule 149*, and see *Rule 143.*)

Relief claimed, to be specifically stated.—Where a defendant by his statement of defence, or counter claim, claims to be entitled to any relief, it must be specifically claimed, either simply, or in the alternative, and he may also add a prayer for general relief in the same manner as in a statement of claim. (*Rule 133.*) see *ante* p. 87.

Distinct grounds of defence.—Distinct grounds of defence, set-off, or counter claim, founded upon separate and distinct facts, are to be stated in the statement of defence, as far as may be, separately and distinctly. (*Rule 134.*)

Pleas in abatement.—No plea, or defence, can be pleaded in abatement. (*Rule 142.*) The effect of a plea of abatement under the old practice at law was to stay all proceedings in the action on the merits, until the question raised by the plea in abatement, was disposed of. The defences raised by a plea in abatement under the former practice may still be pleaded, but they cannot be pleaded alone as formerly, but must be pleaded along with any other defence the defendant may have to the action.

Actions for recovery of land.—A defendant who is in possession by himself or his tenant, need not plead his title, but it is sufficient to state in his statement of defence, that he is so in possession, and he may rely thereunder, upon any defence which he can prove, except:—

(a) Where the defence depends on an equitable estate, or right; or:—

(b) Where relief is claimed upon any equitable ground, against any right or title asserted by the plaintiff. (*Rule 144.*) In either of these cases his defence must be specially pleaded.

X 9
Not guilty by Statute.—There are many Acts of Parliament which give a defendant the right to plead “not guilty,” simply, and prove under that plea any special matters of defence, without specially pleading the same. In all such cases a defendant may still plead “not guilty” by statute, and such defence is to have the same effect as before the *Judicature Act*. But if a defendant so plead, he cannot plead any other defence without the leave of the Court. (*Rule 145.*) Where the defence of “not guilty” by statute is pleaded, the defendant must insert in the margin of his statement of defence, the words “by statute,” together with the year or years of the Reign, and the numbers of the chapters, and sections, of each of the Acts on which he relies, and must specify whether such Acts are public, or private; otherwise the defence will not be taken to be by virtue of any Act of Parliament, and such memorandum as to the Acts relied on is also to be inserted in the margin of the *nisi prius* Record. (*See R. G. T. T. 1856, 21.*) Any statute relied upon for the defence, must be referred to in the margin, as well as that by which the plea is allowed (*VanNatter v. The Buffalo and Lake Huron R. W. Co.* 27 U. C. Q. B. 81,) but the omission may be waived, (*Burridge v. Nicholletts* 6 H. & N. 383,) or cured by amendment even after verdict, and a rule *nisi* to set it aside, (*Edwards v. Hodges*, 15 C. B. 477; *VanNatter v. The Buffalo and Lake Huron R. W. Co.*, *supra.*)

A person acting in aid of another who is entitled to plead “not guilty” by statute, may also so plead, but not a mere volunteer. (*Dale v. Coon*, 2 Pr. R. 160.) The plea puts in issue not only the defences peculiar to the statute under which it is pleaded, but all that would have arisen at Common Law, *e. g.*, in an action for an excessive distress, a plea of not guilty under 11 G. 2, c. 19, s. 21, puts in issue

not only the matter of justification, but also the tenancy, and ownership of the goods. (*Arch. Pr.* 13th ed. 267). But a defence on equitable grounds has been held inadmissible under such a plea. (*Brown v. Blackwell*, 35 U. C. Q. B., 239). The plea is not demurrable, though the statute referred to be inapplicable, but the reference to the statute may be struck out on motion. (*Cairns v. Water Commissioners of Ottawa*, 25 U. C. C. P. 551). Special pleas were not in general allowed to be pleaded with this plea. (*O'Donohoe v. Maguire*, 1 Pr. R. 131; *Dale v. Coon*, 2 Pr. R. 160).

Defence arising after action.—Grounds of defence arising after action brought, but before the delivery of the statement of defence, may be pleaded either alone, or with other grounds of defence. (*Rule* 151.) And where any ground of defence arises after the delivery of the statement of defence, the defendant may, within eight days after such ground of defence has arisen, deliver a further defence setting forth the same, or introduce the same, by amendment, into his statement of defence. (*Rule* 153.) Such amendment may be made without order, on filing a *præcipe*, and an affidavit that the matter of the amendment arose within eight days before the making of such amendment. (*Rule* 155.) It would also seem necessary that the affidavit above referred to should be filed with "the further defence," although it does not appear to be expressly so provided by the *Rules*. (See *MacLennan*, 192, note to *Rule* 153.)

A plaintiff may deliver a confession of any such defence arising after action, and thereupon is to be entitled to sign judgment for his costs up to the time of the pleading of such defence, unless the Court, or Judge, shall otherwise order. (*Rule* 157.)

The plaintiff may also set up in answer to a counter claim, any matter of defence thereto, arising after its delivery. See *post* p. 106.

3. FILING, AND SERVICE OF PLEADINGS.

Filing, and Service.—Every pleading is to be filed (*Rule 150*) and served on the solicitor of every opposite party, who appears by a solicitor, (*Rule 131*.) or the agent of such solicitor, or on the opposite party himself, if he does not sue, or appear, by a solicitor; or it may be left at the address for service, if any, (see *Rules 19, 53*.) of a party suing, or defending, in person. If no address, or no address for service when necessary, be stated by a plaintiff on the writ, the pleading may be served by posting it up in the office, (*Rule 19*.) and if the defendant's address, or the address for service stated by a defendant, be illusory, or fictitious, application may be made to serve such defendant by posting up the pleading in the office. (*Rule 54*.) Where a defendant who has been duly served with the writ of summons does not within the time limited therefor, enter an appearance, service may be effected on him by posting up a copy of the pleading in the office where it is filed. (*Rule 131*.)

Time of Service.—Pleadings, notices, summonses, orders, rules, and other proceedings, must be served before the 4 hour of ~~six~~ p.m., except on Saturdays, when they must be served before 2 p.m. Service effected later is to be deemed to be made on the next day, except where the next day is a Sunday, and then on the following Monday. (*Rule 459*.)

No pleadings are to be delivered or amended in the Long Vacation, except by consent, or unless directed by the Court, or a Judge. (*Rule 460*, and see *J. A.*, s. 10.)

Where filed.—Pleadings are to be filed in the office from which the writ issues, except in actions in the Queen's Bench, and Common Pleas, Divisions, in Toronto. In these actions the writ issues from the office of the Clerk of the Process, but the subsequent proceedings up to final judgment, are to be carried on in the office of the Registrar of the Division to which the action is assigned. (*a*)

(a) But see *ante* p. 58, note (a).

4. THE STATEMENT OF CLAIM.

When to be delivered.—The plaintiff may deliver his statement of claim at the time the writ of summons is served, or at any time before appearance, or within three months after the defendant has appeared. It may be delivered, although the defendant may have dispensed with its delivery. If not served before appearance, and if the defendant has not dispensed with its delivery, it must be filed and served (*Rules 131, 150*) within three months from the entry of appearance. (*Rule 158.*) After the expiration of the three months it cannot be delivered without leave. (*Rule 158c.*) If the plaintiff is not, within that time, in a position to deliver the statement of claim, against all the defendants, by reason of the time for appearance of some of them not having expired, he should apply to enlarge the time for delivering the statement of claim to the defendants who have appeared.

To be filed and served.—The statement of claim is to be filed and served. (*Rules 131, 150.*) It must be filed in the office from whence the writ of summons issued, except in actions commenced in the Queen's Bench, and Common Pleas, Divisions, in Toronto, in the latter cases the statement of claim, and all subsequent pleadings, are to be filed in the office of the Registrar of the Division, to which the cause is assigned. (*a*)

How to be served.—If the statement of claim be served with the writ, it must be served in the same manner as the writ of summons. If served after the writ has been served, the service must be effected on the solicitor of a defendant who has appeared by a solicitor, or personally on a defendant who has appeared in person, or it may be left at the defendant's address for service, if any, or if the address given in the appearance be illusory or fictitious, then leave may be obtained in Chambers to serve the statement of claim by posting it up in the office in which the appearance is entered. (*Rule 54.*) Where it is desired

(a) But see *ante* p. 58, note (a).

to serve a statement of claim on a defendant who has been served with the writ, but who has not appeared within the time limited, the service may be effected by posting up a copy in the office where the statement of claim is filed. (*Rule 131.*)

Consequence of not filing.—See ante p. 82.

(a) Form of statement of Claim.

Where writ specially indorsed.—Where the writ has been specially indorsed and the defendant has not dispensed with the delivery of a statement of claim, the plaintiff may file a copy of the writ and indorsements, if not already filed, and deliver as his statement of claim a notice stating that his claim appears by the indorsement of the writ. For form of this notice see *Form No. 16.* (*Rule 159.*) This form, however, omits to name the place of trial, as required by *Rule 254.*

A statement of claim in this form is sufficient, unless the Court, or a Judge, shall order the delivery of a further statement. (*Rule 159.*) If a further statement be ordered it must be filed and served within the time named in the order, and if no time be named, then within three months from the entry of appearance. (*Rule 159.*)

In other cases.—The statement of claim in other cases will in substance somewhat resemble a bill in Chancery under the former practice. It must set out, as briefly as possible, (*Rule 126*) the material facts on which the plaintiff's claim is based, and conclude with a statement of the specific relief claimed by him, and may also contain a prayer for general relief. The statement is to be divided into paragraphs, numbered consecutively, and each paragraph is to contain, as nearly as may be, a separate allegation; dates, sums, and numbers, are to be in figures. The signature of counsel is unnecessary. (*Rule 128.*) The place of trial must be named, (*Rule 254,*) in actions for the recovery of land it must be the county town of the

county where the land lies ; in other actions the plaintiff may name any place he pleases. See *ante* p. 87.

5. DEFENCE, HOW MADE.

After a plaintiff has delivered his statement of claim, where one is required to be delivered, the defendant must deliver his defence to the action, or the plaintiff will be at liberty to proceed in default of defence. As we have already seen, the plaintiff is not bound to wait until after appearance to deliver the statement of claim, but he may do so either with the writ of summons, or *at any time afterwards*, before, or within three months after, the entry of appearance. (*Rule 158.*) He cannot, however, by serving the statement of claim before appearance, accelerate the time for the delivery of the statement of defence.

There are various modes of defence open to a defendant :
e. g.—

I. He may put in a statement of defence, by which he raises such defences as he may have to the plaintiff's claim ; or he may put in, alone, or together with, such statement of defence, a counter-claim, or set-off. This counter-claim, or set-off, may be :—

(a) against the plaintiff alone : or—

(b) against the plaintiff, and some third person.

If against the plaintiff alone, it may relate to any claims whatever which would form the subject of an independent action against the plaintiff ; but if against the plaintiff and some third person, it must arise out of, or relate to, the original subject of the action.

II. Where the action is to recover money, and the defendant merely desires to dispute the correctness of the amount claimed, he may file a notice disputing the amount claimed, but this notice must be filed with the appearance, or must be filed, and served, within four days after. (*Rule 68.*)

III. The rules, moreover, provide that in cases where the defendant claims any relief over, in respect of the matters in question, against any third party, he may, in order to bind such third party, and prevent him afterwards calling in question, the judgment which shall be recovered in the action, serve him with a notice in the same manner as with a writ of summons; and upon being served with this notice, the third party may appear in the action; and upon application to the Court, or a Judge, for that purpose, directions may be given, enabling such third party to defend the action if so disposed.

IV. Or if the statement of claim discloses no case for relief, upon the facts alleged therein, he may demur thereto.

We will now proceed to consider more in detail the different modes of defence above indicated.

(a) Statement of Defence, and Counter-Claim.

Within what time to be delivered.—The statement of defence must be delivered within eight days from the service of the statement of claim, if any, or from the time limited for appearance, whichever shall be last: (*Rule 160*), except where the defendant has been served out of the jurisdiction, in which case the statement of defence must be filed within the time limited for appearance. (*Rule 46*.) The time may, however, be extended. (*Rule 160*.) If the defendant has dispensed with the delivery of a statement of claim, he must deliver his statement of defence within eight days after his appearance, unless the time is extended by the Court, or a Judge. (*Rule 161*.) Where the defendant has obtained leave to defend an action in which the writ is *specially indorsed*, he is to deliver his statement of defence, within such time as is limited by the order, and if no time be named therein, then, within eight days after the order. (*Rule 162*.) But see *ante* p. 80.

To be filed, and served.—The statement of defence must be filed and served. (*Rules 131, 150*.) If the address of

a plaintiff suing in person be not indorsed, or if such address be more than two miles from the office whence the writ issued, and no address for service within two miles be given, the service may be made by posting up the statement of defence in the office. (*Rule 19*, and see *ante* p. 92.)

Where filed.—The statement of defence must be filed in the office where the appearance is required to be entered.

Form of.—For forms of statements of defence, and counter-claim, see *Forms* Nos. 40, 42, 44, 46, 48, 49, 51, 55, 57, 60, 62, 65, 69, 73.

Jury Notice.—Except in actions for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, and false imprisonment; wherever the defendant desires the action to be tried by a jury, he must, with his last pleading, serve a notice on the plaintiff, according to the former practice. For Form of Notice, see *R. S. O.* c. 50, s. 253.

Set-off, and Counter-Claim.—An important change has been introduced by the provisions of the *Judicature Act* and *Rules* allowing a defendant to set up counter-claims in an action. A defendant in any action may now set off, or set up by way of counter-claim, against the claim of the plaintiff, any right or claim, whether such set-off, or counter-claim, sound in damages or not. Such set-off, or counter-claim, is to have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce final judgment, both on the original, and cross-claim (*Rule 127*.) Equitable debts, and claims for unliquidated damages, may now be made the subject of a set-off, or counter-claim.

If the defendant establishes his counter-claim, he may recover judgment for the balance, if any, found in his favour, or may obtain judgment for any other relief he may be entitled to on the merits. (*Rule 169*.)

A counter-claim may be made by a defendant against the plaintiff, or against the plaintiff and another person,

but no claim to any relief in which the plaintiff is not interested, can be made against a co-defendant, or a third person, by way of counter-claim. (*J. A. s. 16*, sub-s. 4; *Treleven v. Bray*, 1 Chy. D. 17; *Warner v. Twining*, 24 W. R. 536; *Dear v. Swarder*, 4 Ch. D. 476.)

The relief claimed by a counter-claim, against the plaintiff and a third party, must relate to the subject matter of the action. (*Harris v. Gamble*, 6 Chy. D. 748.) But when the counter-claim is against the plaintiff alone, it may relate to any matter which might be the subject of an independent action (*Quin v. Hession*, 40 L. T. 70); except claims against him in some other character from that in which he sues. (*Macdonald v. Currington*, 4 C. P. D. 28.) But notwithstanding the defendant's right to plead such set-off and counter-claim, the plaintiff or any third party named in the counter-claim may, within three weeks after service of the counter-claim (*Rule 168*), and before the trial, apply in Chambers to strike out such set-off, or counter-claim, if it cannot be conveniently disposed of in the action, or for any reason, ought not to be allowed. (*Rule 127*; *Padwick v. Scott*, 2 Chy. D. 736; *Dear v. Swarder*, 4 Chy. D. 476; *Naylor v. Farrer*, 26 W. R. 809; *Huggons v. Tweed*, 10 Ch. D. 359.)

For cases in which counter-claims have been allowed, or disallowed, under the English rules (see *MacLennan*, 173-9.)

Counter-claim affecting Third Party.—Where the defence sets up a counter-claim against the plaintiff and some third party, the defendant is to add to the original style of cause, another setting forth his own name as plaintiff, and the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants. (See *Form No. 69*.)

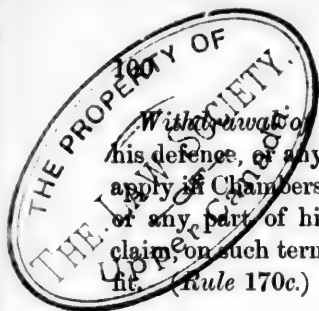
Service of Counter-claim on Third Party.—When a defendant by his statement of defence makes a counter-claim for relief, against the plaintiff and some third person not already a party to the action, the latter is to be summoned to appear, by service on him of a copy of the counter-claim.

The service is to be made within the time allowed for serving the statement of defence on the plaintiff, (*Rule 164*), and in the same manner as service upon a defendant of a writ of summons. (See *ante* p. 52.)

Appearance of Third Party.—The statement of defence, or counter-claim, so served must be indorsed with a notice, requiring the third party to appear thereto within eight days from service, (*Rule 165*, and see *Form No. 19*), and he may appear thereto as if he had been served with a writ of summons. (*Rule 166*.) For Form of Appearance, see *Form No. 81*. And he may deliver a reply within eight days after service on him of the counter-claim, unless the time be extended. (*Rules 167, 160*). He cannot, however, file a counter-claim against the defendant who brought him in. (*Street v. Grover*, 2 Q. B. D. 498.)

Payment into Court.—In any action to recover a debt, or damages, any defendant may, after service of the writ, and before, or when, delivering his defence, or by leave of the Court, at any subsequent time, pay into Court, a sum of money by way of satisfaction or amends. Such payment is to be pleaded in the defence (*Rule 215*) (a), and the defendant is not precluded thereby from denying the plaintiff's cause of action as well, (*Berdan v. Greenwood*, 3 Ex. D. 251; *Hawkesley v. Bradshaw*, 5 Q. B. D. 22, 303.) Money so paid in may, unless otherwise ordered, be paid out to the plaintiff, or his solicitor on his written authority. (*Rule 217*.) If the money be paid in before the delivery of the defence, the plaintiff may within four days after the receipt of notice of such payment, or if such payment is first stated in the statement of defence, then before reply, give notice (*Form No. 22*) that he accepts the same in satisfaction of the causes of action in respect of which it is paid in. If it is accepted in satisfaction of the entire cause of action, the plaintiff may tax his costs, and if not paid within forty-eight hours may sign judgment therefor. (*Rule 218*.)

(a) But see *Rule 216* which provides that if the payment in, be made before delivering defence, a notice is to be served. *Form No. 21*.



DISPUTE NOTE.

Withdrawal of Defence.—A defendant cannot withdraw his defence, or any part thereof, without leave, but he may apply in Chambers, and obtain leave to withdraw the whole, or any part of his alleged grounds of defence, or counter claim, on such terms as to costs, and otherwise, as may seem fit. (*Rule 170c.*)

Where a defendant in an action of ejectment was allowed to withdraw his defence on the terms of paying the plaintiff's costs of the action so far as they were occasioned by the defendant's defence down to the date of the application to withdraw, he was held to be discharged from the general costs of the action, and only liable for the additional costs, over and above the general costs, occasioned by such defendant having defended the action, (*R. & P. Advance Co. v. McCarthy*, 44 L. T. 515.)

(b) Dispute Note.

Where the defendant merely wishes to limit his defence to the question of the amount to which the plaintiff is entitled, he may do so by adding a statement to that effect to his appearance; or may file and serve a notice to that effect (see *Form No. 15*) within four days after appearance. (*Rule 68.*) This mode of defence, however, only appears to be appropriate where something is admitted to be due, and not when for any reason the defendant claims that the plaintiff's claim is wholly barred. (See *Cattanach v. Urquhart*, 6 Pr. R. 28; *Wright v. Morgan*, 1 App. R. 216.)

The effect of the notice is the same as if the defendant had disputed the amount due in a statement of defence, and no further statement of defence is necessary. (*Rule 68.*) Where the notice is made part of the appearance, it does not appear to be requisite that a copy should be served on the plaintiff; but when it is filed after the appearance, a copy must be served on him. (*Ib.*)

(c) Notice to Third Party, liable to Defendant for contribution, &c.

One of the new methods of procedure, under the *Judicature Act*, is that which enables a defendant to bring before the Court any third person from whom he may claim contribution, indemnity, or any other relief, in respect of any claim made against such defendant in the action; not however for the purpose of getting any relief against such third person, but merely to bind him by the proceedings in the action. This is accomplished not by counter-claim, (which, as we have seen, is confined to cases in which relief is claimed by the defendant against the plaintiff alone, or against some third person jointly with the plaintiff,) but by serving a notice on the third person. The Court also may itself direct such a notice to be served on a third party.—Thus, wherever a defendant is, or claims to be, entitled to contribution, or indemnity, or any other remedy, or relief over, against any other person; or where, from any other cause, it appears to the Court, or a Judge, that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and defendant and any other person, or between any, or either, of them, the Court, or a Judge, on notice being given to such last mentioned person, may make such order as may be proper for having the question determined. (*Rule 107*, and see *Rule 109*.) For forms of notice (see *Form No. 18*.) The Court of its own motion may, direct notice to be given to a third party, and may, if necessary, postpone the trial, for the purpose of enabling any of the parties to give such notice. (*Rule 109*.) When the Court directs notice, it is ordinarily to be given by the plaintiff.

Effect of Notice.—Where a third person is served with such a notice, no relief can be awarded to the defendant against him, but the effect of the notice is merely to bind the third party by the judgment which shall be given in the action, and to preclude him from disputing it in any action which may be afterwards brought against him by

the defendant. (*Treleaven v. Bray* 45 L. J. Chy. 113; *Swansea Shipping Co. v. Duncan*, *Ib.* 640; *Benecke v. Frost*, 1 Q. B. D. 422; *Re Collie*, 2 Chy. D. 51). Third parties will not be allowed to be brought in, if the plaintiff will be prejudiced or delayed thereby. (*Rule 112, Bower v. Hartley*, 1 Q. B. D. 652; *Wye Valley R. W. Co. v. Hawes*, 16 Chy. D. 489.) Except on such terms as may prevent the plaintiff being so prejudiced. (*Ib.*)

Where the defendant has no reason to contest the plaintiff's claim he is not bound to put in a statement of defence, but may content himself with filing the notice, and serving it on the third party, against whom he claims relief over, leaving it to such third party to get leave to contest the plaintiff's claim if so disposed. (See *Rule 111.*)

How Given.—Where the defendant desires to notify any third party, against whom he claims relief over, under the provisions of *Rule 107*, he must file a copy of the notice, (see *Form No. 18*.) and serve a copy of it, together with a copy of the plaintiff's statement of claim, or if there be none, then a copy of the writ of summons and indorsements, on such third party. The service of the notice is to be effected according to the rules relating to the service of a writ of summons. No provision is made for serving a copy of the notice on the plaintiff, but where no statement of defence is filed, it would seem necessary that it should be done. The notice is to state the nature and grounds of the defendant's claim, and unless otherwise ordered, is to be served within the time limited for filing his statement of defence. (*Rule 108.*)

When the Court directs the notice to be given, it will ordinarily be required to be given by the plaintiff, and the form of notice (*Form No. 18*) will, in that case, require to be modified.

Appearance by Third Party.—If the third party served with the notice, desires to dispute the plaintiff's claim in the action as against the defendant, he must enter an appear-

ance within eight days from the service of the notice, (see *Form No. 80*), or he is to be deemed to admit the validity of the judgment obtained against the defendant, whether by consent or otherwise. He may, however, apply for leave to appear after the time has elapsed. (*Rule 110.*) After appearance he may, if he think proper, move to set aside the notice served on him, on notice to the defendant serving it, and the plaintiff. (*Bower v. Hartley*, 1 Q. B. D. 652; *Wye Valley R. W. Co. v. Hawes*, 16 Ch. D. 489; *Horwell v. London General Omnibus Co.*, 2 Ex. D. 365.)

After appearance, the third party may, by leave, actively assist in resisting the action, and the plaintiff may obtain discovery from him, as from a defendant. (See *McAllister v. Bishop of Rochester*, 5 C. P. D. 194.)

Special Directions as to Mode of Trial—Costs.—After appearance by the third party, the defendant giving the notice may apply in Chambers for directions, as to the mode of having the question in the action determined. The Court, or Judge, upon the hearing of the application, may allow the person served with the notice, to defend the action upon such terms as may seem just, and may direct the delivery or amendment of pleadings, and give any other directions, as may seem proper, for having the question most conveniently determined, and with respect to the mode, and extent, in, or, to which the person so served, shall be bound or made liable, by the decision of the question, and also as to the costs of the proceedings. (*Rule 111, Schneider v. Batt*, 44 L. T. 142.) Directions may also be given to prevent a plaintiff from being delayed in the recovery of his claim. (*Rule 112.*)

6. PROCEEDINGS AFTER DELIVERY OF STATEMENT OF DEFENCE.

(a) *Cases in which Judgment may be obtained.*

After a statement of defence, or counter-claim, has been delivered, it is for the plaintiff to consider what should be his next step in the action. After the delivery of a statement

of defence, or a notice disputing the plaintiff's claim, the plaintiff is, in some cases, in a position to obtain judgment on *præcipe*, and in others he may move for judgment without filing any further pleading.

Actions for Foreclosure, Sale, or Redemption.—If the action be for foreclosure, sale, or redemption of mortgaged property, and the statement of defence admits the execution of the mortgage, and other facts entitling the plaintiff to judgment, if the defendants are adults, the judgment may be obtained as formerly, in Chancery, on a *præcipe* being filed therefor, in Toronto with the Registrar of the Division in which the action is pending, or in actions in the outer counties, with the officer from whose office the writ issued. No notice to the defendant is necessary, unless by his statement of defence he disputes the amount claimed to be due by the plaintiff, and the account is to be taken by the officer entering the judgment.

So also where the only defence put in by the defendant, is one limited to the question of the amount due, the plaintiff may, in like manner, obtain judgment, in cases where the defendants are adults, upon *præcipe*, but a defendant in such a case, as well as where he files a statement of defence disputing the amount due, is entitled to four days' notice of the taking of the account, whether it be taken by the officer who enters the judgment, or by a Master to whom the action is referred. (*Rule 78.*)

In actions of this character where the defendants are infants, and no defence is raised by the statement of defence, the judgment may be obtained by the plaintiff on motion in Chambers. The notice of the motion must be served on the guardian *ad litem* of the infant defendants and such of the adult defendants as have appeared, and must be supported by affidavits of the due execution of the mortgage and such other facts and circumstances as entitle the plaintiff to judgment. (See *Chy. O. 434*, and *Rule 79.*)

(b) *Motion for Judgment.*

In other actions where the statement of defence admits, or offers no defence to, the plaintiff's claim, and the plaintiff is prepared to admit the facts alleged in the statement of defence, it will be open to him to set the cause down to be heard on motion for judgment. See *post* p. 129.

(c) *Discontinuance.*

The plaintiff, at anytime before, or after, the receipt of the statement of the defence, may, if he please, file, and serve on the defendant, a notice wholly discontinuing the action, or withdrawing any part, or parts, of his alleged cause of complaint, and thereupon he is to pay the defendant's costs of the action, or if it be not wholly discontinued, the costs occasioned by the matter withdrawn, (*Rule 170*), and for which the defendant is entitled to enter judgment, (*Rule 172*.) Such discontinuance is not a defence to any subsequent action. (*Rule 170*.) For form of notice of discontinuance, see *Chitty's Forms*, 11th ed. 194. For form of judgment for defendant's costs see *Form No. 164*.

(d) *Confession of Defence arising after Action brought.*

The plaintiff may also deliver a confession of any defence set up, which has arisen after action brought, and is thereupon to be entitled to judgment for his costs up to the time of the pleading of such defence, unless the Court, or Judge, otherwise order. (*Rule 157*.) For form of confession of defence, see *Form No. 17*, and for form of judgment for costs, see *Form No. 165*.

(e) *Reply.*

Cases in which a Reply necessary.—Where, however, the statement of defence sets up a substantial matter of defence, two modes of meeting it are open to the plaintiff. He may either amend his statement of claim, if by amendment he can avoid the defence set up; or he may file a pleading called a reply, whereby he may take issue on the facts

set up in the statement of defence, or set up new matter as an answer thereto. He cannot, however, by a reply plead any matter inconsistent with his statement of claim. (*Rule 149.*) If he wish to do that, he must amend the statement of claim. A reply seems the appropriate mode of pleading only where the matter desired to be set up in answer to the defence, is consistent with the allegations contained in the plaintiff's statement of claim; or is some matter of defence to a counter-claim, or set-off, arising after its delivery. (*See Rule 152.*)

Time for Delivering.—The reply must be filed and served within three weeks after the defence, or the last of all the defences, where more than one shall have been delivered, unless the time be extended. (*Rule 178; Ambroise v. Evelyn, 11 Ch. D. 762.*)

Where filed.—It is to be filed in the office where the appearance is entered. (*Rule 50.*)

Service.—Service is to be effected in the same manner as of a statement of defence. See *ante* p. 96.

Jury Notice.—Where the plaintiff desires the action to be tried, or the damages to be assessed, by a jury, he must with his last pleading serve the notice required by the former practice, see *R. S. O. c. 50, ss. 252-3.*

Matter of defence to Counter-claim, or Set-off, arising after its delivery.—Any matter of defence to a set-off, or counter-claim, arising after its delivery, may be pleaded in reply, or be introduced by amendment into the statement of claim, within three weeks after the defence or the last of the defences, when more than one, shall have been delivered, unless the time be extended (*Rule 152*); or if the matter of defence arises after the expiration of the above period of three weeks, it may be pleaded by the filing and serving of a further reply within eight days after it arises, or it may within that period be introduced by amendment into the statement of claim. (*Rule 154.*) The amendments may be made on *præcipe*, without order,

on filing an affidavit that the matter of the amendment arose within eight days next before the day of making such amendment. (*Rule 155.*)

Pleading subsequent to reply.—Cannot be delivered without leave. (*Rule 174.*) If allowed, it must be delivered within four days after the delivery of the previous pleading, unless the time be extended. (*Rule 175.*)

7. REPLY BY THIRD PARTY.

A third party against whom a defendant files a counter-claim, as we have seen, is entitled within the time allowed for filing a statement of defence, to file a reply to such counter claim. He cannot, however, set up a counter-claim against the defendant by whom he has been brought into the action, see *ante*, p. 99.

8. DEMURRER.

A demurrer is a pleading which admits the facts as stated in the pleading, or part of the pleading demurred to, and refers the law arising thereon to the judgment of the Court. Any party may demur to any pleading, or any part of a pleading setting up a distinct cause of action, or ground of defence, set-off, or counter-claim, on the ground that the facts alleged do not constitute any ground of relief, or defence, as the case may be, as against the party demurring. (*Rule 189.*)

Pleading to part, and Demurring to part.—Any party may demur to part of a pleading, and put in a defence to any other part; but the demurrer and defence are to be combined in the same pleading. (*Rule 192.*)

Pleading and Demurring to same Pleading.—Any party may, without leave, at the same time plead and demur to the same pleading, on annexing to, and filing with, the plea and demurrer, an affidavit of the party pleading, distinctly denying some one or more material statement, or statements, in such pleading; or stating that the several matters sought

to be pleaded by way of confession and avoidance, are respectively true in substance, and in fact, and that he is further advised and believes, that the objections raised by the demurrer, are good and valid objections in law. A copy of the affidavit is to be served with the plea and demurrer. (*Rule 193.*) Leave may be given to plead and demur without filing such affidavit, on a special application for that purpose in Chambers, (*Rule 194.*) but even in such case an affidavit, at least, of belief that there is good ground of traverse, &c., would seem necessary. It seems doubtful whether a defendant corporation aggregate, can plead and demur without leave, as such a defendant is unable to make the required affidavit.

To be Filed and Served.—The demurrer must be filed, and served on the party whose pleading is demurred to. (See *Rules 191, 150, 131.*)

Time for Filing.—The demurrer must be delivered within the same time as any other pleading in the action, (*Rule 191.*) *i. e.*, a demurrer to a statement of claim must be delivered within the time allowed for delivering a statement of defence; and a demurrer to a statement of defence, set-off, or counter claim, within the time allowed for filing a reply; and a demurrer to a reply within such time, if any, as the Court, or a Judge, may allow for pleading thereto. (See *Rule 174.*)

Form of.—The demurrer must state specifically whether it is to the whole, or to a part, and if to part, to what part of the pleading, in respect of which it is filed; and it must also state some ground of law for the demurrer, but on the argument other grounds, besides those stated, may be taken. For form, see *Form No. 74.*

Setting Aside.—If no ground, or only a frivolous ground of demurrer be stated, it may be set aside by the Court, or a Judge, with costs. (*Rule 190.*) So also, where a demurrer and a pleading to the same pleading are filed without the requisite affidavit, or without leave, where leave is necessary.

Entry for Argument.—Either party may enter the demurrer for argument immediately. For form of *præcipe* to set the cause down for argument see *Form No. 86*. A *præcipe* in this form is to be filed with the Registrar of the proper Division, at Toronto, when the cause is in either the Queen's Bench, or Common Pleas Divisions, and if in the Chancery Division, with the Clerk of Records and Writs. (*Rules 195, 202; J. A., s. 91.*) The demurrer must be entered, six days before the day on which it is to be heard. In the Queen's Bench, and Common Pleas, Divisions, demurrers may be set down for argument on any Tuesday or Friday, and in the Chancery Division, on any Wednesday, except during vacations. (*Rules H. C. J. II., III., IV., see App. C, Chy. O. 593.*)

If the demurrer be not set down within ten days after its delivery, it will stand allowed without argument. (*Rule 195a, and see post p. 110.*)

Notice of Setting Down.—A notice of the setting down (see *Form No. 28*) is to be served on the same day on the opposite party. (*Rules 195, Rule H. C. J. V., see App. C.*) The notice is to be served in the same manner as a pleading. (See *ante p. 91.*)

Delivery of Demurrer Book.—Two days before the day on which the demurrer is to be argued, a copy of the demurrer book, must be left with the Registrar of the Division, for the use of the Judge. (*Rule H. C. J. VI., see App. C.*)

Argument.—Demurrers will be heard and disposed of in all the Divisions, by a single Judge, in accordance with the former practice in Chancery. The counsel for the party demurring usually begins, and has the right to reply; and where there are cross-demurrers, the counsel for the party first demurring begins.

Costs, where Demurrer allowed.—Where the demurrer is allowed upon argument, the party whose pleading is demurred to must pay the costs of the demurrer, unless the Court otherwise order, (*Rule 197, Roche v. Jordan, 20 Chy.*)

573,) and when the demurrer is to the whole of the statement of claim, the plaintiff must also pay the defendant's costs of the action, unless he get leave to amend, and amend accordingly. (*Rule 198*). Where fraud was charged, and leave to amend given, the costs of a successful demurrer were reserved. (*Duckett v. Gover*, 6 Chy. D. 82).

Costs, where Demurrer overru'ed.—Unless otherwise ordered, the party demurring must pay the costs of the opposite party occasioned by the demurrer. (*Rule 200*).

Effect of successful Demurrer to part.—When a demurrer to a part of a pleading is allowed, that part is to be deemed to be struck out of the pleadings. (*Rule 199*.)

Leave to Plead.—Where a demurrer is overruled the Court may allow the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to. (*Rule 201*).

Amendment of Pleading.—After a demurrer has been filed to the whole or any part of a pleading, the latter cannot be amended during the pendency of the demurrer, except under order, which can only be granted on payment of the costs of demurrer. (*Rule 196*.) The application to amend, should be made ordinarily in Chambers, and the order obtained before the ten days have elapsed from the delivery of the demurrer, otherwise it will stand allowed. (*Rule 195a*, and see *infra*.) Leave to amend may also be granted on the argument.

Judgment.—Two different modes prevailed at law and in equity, as to the form of judgments on demurrer. At law a rule for judgment was granted, and a formal judgment was entered thereon. (See *Chitty's Forms*, 11th ed., pp. 185-7.) In equity the practice was simply to draw up an order allowing, or disallowing, the demurrer. (See *Seton*, 4th ed., 1628-9.) It would seem that the former system will still prevail in the Queen's Bench, and Common Pleas, Divisions, and the latter system in the Chancery Division. (*J. A. s. 12*.)

Demurrer allowed without Argument.—If a demurrer be not set down for argument, and notice given, within ten days after delivery, or if the party whose pleading is demurred to, does not within that time obtain and serve an order to amend,—the demurrer, without argument, is to be held sufficient, and with the same result as to costs, as if it had been argued, (*Rule 195a.*) No procedure is laid down by the *Rules* for entering judgment in such a case, but it would seem that where the demurrer stands allowed without argument, the party demurring will be entitled in the Queen's Bench, and Common Pleas, Divisions, to enter judgment on producing to the officer an affidavit that the demurrer has not been set down, and that no order to amend has been served. For form of judgment in such case see *Chitty's Forms*, 11th ed., p. 186. In England in the Chancery Division, instead of a judgment being entered, an order of course for payment of costs, is granted on petition. (See *Daniels's Forms*, 3rd ed., p. 286; *Seton*, 4th ed., 1629.) Probably until further *Rules* are made, judgment will be entered in such cases in the Queen's Bench, and Common Pleas, Divisions, and orders of course will be granted in the Chancery Division. (See *J. A. s. 12.*)

CHAPTER X.

PROCEEDINGS IN DEFAULT OF PLEADING.

1. *By Plaintiff.*

(a) *Cases in which final Judgment may be obtained.*

(b) *Interlocutory Judgment.*

(c) *Cases where motion for Judgment necessary.*

2. *By Defendants.*3. *By, or against, Third Parties.*

1. BY PLAINTIFFS.

(a) *Cases in which final Judgment may be obtained.*

Actions for Debt, or Liquidated Demand.—If the plaintiff's claim be only for a debt, or liquidated demand, and the defendant does not, within the limited time allowed for the purpose, deliver a defence or demurrer, the plaintiff, at the expiration of such time, may enter final judgment for the amount claimed, with costs. (*Rule 204.*) For form of judgment, see *Form No. 148.* If there are several defendants and only some of them make default, final judgment may be signed, and execution issued thereon, against those in default, without prejudice to the plaintiffs proceeding with the action, against any defendants who have put in a defence. (*Rule 205.*) If any claim for detention of goods, or for pecuniary damages, be joined with a claim for debt, or liquidated demand, final judgment may, on default of defence, be signed for the debt, or liquidated demand, and interlocutory judgment entered as to the other causes of action, (*Rule 208.*) and the plaintiff may proceed to assess damages as to the latter. See *ante* p. 72.

Actions for recovery of Land.—In actions for the recovery of land, in default of defence, final judgment for possession and costs, may be entered, (*Rule 209*), (see *Form No. 150*, but to this form must be added a clause awarding costs); and where in an action for the recovery of land, a claim for *mesne* profits, arrears of rent, or damages for breach of contract, is joined, and no defence is put in, final judgment may be entered for possession of the land, and interlocutory judgment as to the other causes of action; and the damages may be assessed as to the latter, as has hitherto been the practice at law (*Rule 210*). For form of judgment, see *Form No. 151*. *Quære*, however, whether judgment can be entered for any costs until the damages shall have been assessed. Where there are several defendants in an action for the recovery of land, and other claims are joined as before mentioned, and some only are in default, judgment may be signed as to those in default, without prejudice to the plaintiff's proceeding against the others; and this would seem to be intended to be the practice, where the action is for the recovery of land alone, and some defendants defend, and others do not, but the judgment in both these cases would seem to be merely interlocutory, according to the former practice at law. (See *J. A.*, s. 12.)

Actions for Foreclosure, Sale, or Redemption.—In default of defence where the action is for foreclosure, and none of the defendants are infants, the plaintiff in default of defence, is entitled to obtain judgment upon *præcipe*, (*Rule 78*.) In Toronto the judgment will be entered by the Registrar of the Division to which the cause is assigned, and in the outer counties by the officer by whom the writ was issued. The account will be taken by the officer entering up the judgment, unless a reference as to incumbrances is required by the plaintiff, who must satisfy himself on this point by making the necessary searches in the Registrar's and Sheriff's offices. If any defendant has filed a notice disputing the amount due, he is entitled

to four days' notice of taking the account. For forms of judgment see *Forms* Nos. 168, 169, 170. These forms are framed for default of appearance—they require modification when the judgment is granted in default of defence. It appears to be intended that judgments drawn up in such cases, in the outer counties shall be entered in Toronto. (See *Rule* 418.)

Under the former practice in Chancery, if any of the defendants were infants, on default of defence, or where the answer raised no question as to the plaintiff's right to a decree, a decree might have been obtained in suits for foreclosure, sale, or redemption, on motion in Chambers, on notice to the guardian *ad litem* supported by affidavits of the due execution of the mortgage, and of such other facts, and circumstances, as entitled the plaintiff to judgment, and it would seem that judgment may still be obtained in such cases in this manner. (See *Chy. O* 434, *Rule* 79). If there be any adult parties who have appeared, they should also be notified of the motion.

Where, any special relief is claimed which it is discretionary with the Court to grant or refuse, the cause must be set down to be heard on motion for judgment. (See *post*, chapter xi.)

(b) *Interlocutory Judgment.*

Actions for Unliquidated Damages.—The plaintiff is entitled, on default of defence, in actions for unliquidated damages, to enter interlocutory judgment, and proceed to assess his damages as hitherto. (*Rule* 206.) When there are some defendants who defend, and others who do not, the interlocutory judgment may be entered against the latter, and in that case the assessment of damages is to take place at the trial of the action against the other defendants. (*Rule* 207.)

Actions for Recovery of Land.—Where there are some defendants who defend, and others who do not, the plaintiff would seem entitled to enter interlocutory judgment against

those in default, and proceed with the action against the others according to the former practice at law in such cases. (See *J. A.*, s. 12.)

(c) Cases where Motion for Judgment Necessary.

In all actions, except actions for the recovery of a debt, or liquidated demand, or for the detention of goods, or for pecuniary damages, or for the recovery of land alone, or any or either of such claims, or for foreclosure, sale, or redemption, where only the ordinary relief is claimed; if the defendant makes default in delivering a defence, or demurrer, the plaintiff may set down the cause to be heard on motion for judgment, and such judgment is to be given as, on the statement of claim, the Court shall consider the plaintiff entitled to (*Rule 211*): and if there are several defendants some of whom are in default, and others who are not, the plaintiff may either set the cause down at once to be heard against those in default, or may wait and set it down against them, at the time when the action is entered for trial, or set down on motion for judgment, against the other defendants. (*Rule 212*.) See further as to motions for judgment, *post* chapter xi.

2. BY DEFENDANT.

Where the plaintiff fails to deliver his statement of claim, where one is necessary, within the proper time, the defendant, at the expiration of the time, may move in Chambers to dismiss the action with costs, for want of prosecution, whereupon such order may be made as shall seem just. (*Rule 203*.) If the plaintiff make default in the delivery of a reply, or other subsequent pleading, and fail to give notice of trial within the proper time, (see *post*, p. 118), the defendant may then move in Chambers to dismiss the action for want of prosecution, and on such application such order may be made as may seem just. (*Rule 255*.)

3. BY, OR AGAINST, THIRD PARTY.

Where issues arise between other parties than the plaintiff and defendant, *e. g.*, the defendant and some third party,

against whom a counter-claim is filed, if any party to any such issue, make default in delivering any pleading, the opposite party may apply "to the Court or a Judge" for such judgment, if any, as upon the pleadings he may appear entitled to, and the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties. (*Rule 213.*) An application of this kind would seem proper to be made in Court, and not in Chambers: notwithstanding the *Rule* allows it to be made "to the Court, or a Judge," it only appears to authorize "the Court" to make the order. This, however, may be a mere slip. See *Rule 163*, where there is the same variation in the language of the *Rule*.

Judgment obtained by Default may be set aside.—Any judgment by default, may be set aside on motion to the Court, or in Chambers. (*Rule 214.*) In ordinary cases the motion should be made in Chambers.

CHAPTER XI.

PROCEEDINGS AFTER THE CLOSE OF THE PLEADINGS, TO OBTAIN JUDGMENT.

1. *Modes of Trial of Actions.*
2. *Trials before a Judge, with, or without, a Jury.*
3. *Motions for New Trial.*
 - (a) *When action tried by a Judge alone.*
 - (b) *When action tried by a Jury.*
 - (c) *Motion to set aside Judgment.*
4. *Motions for Judgment.*
 - (a) *Special Cases.*
5. *Trial before Referees, and Arbitrators.*

1. MODES OF TRIAL OF ACTIONS.

Modes of Trial.—Subject to *Rules* of Court, the mode of trial in causes and matters, which, at the time of the passing of the Act, were within the jurisdiction of the Courts of Law, is to be the same as was then provided by law for like cases in actions in the Courts of Queen's Bench, and Common Pleas; and, subject to such *Rules*, in causes and matters over which the Court of Chancery had at the time of the passing of the Act exclusive jurisdiction, the mode of trial is to be according to the former practice of the Court of Chancery. (*J. A. s. 45*).

But different questions of fact arising in an action may be tried in different modes, and at different times, if the Court, or Judge, so direct. (*Rule 256*).

In ordinary cases after the pleadings in an action are closed, there are two modes provided for obtaining the judgment of the Court, viz., the action may be entered for trial,—or it may be set down on motion for judgment. Where there are issues in fact raised by the pleadings, and it is necessary to examine witnesses on either side, the action must be entered for trial; where however, the plaintiff conceives himself entitled to a judgment on the admissions in the pleadings; or the evidence to be adduced

is purely documentary and is not disputed, or where the documents may be proved by affidavit, and no cross-examination of the deponents is required; or where all parties agree that the evidence in the cause shall be given by affidavit, and no cross-examination of any of the deponents is required; in any of such cases the action may be set down to be heard on motion for judgment

1. *Trials before a Judge, with, or without, a Jury.*

Notice of Trial.—Where the cause is required to be entered for trial, it is necessary that notice should be duly given. As soon as the pleadings are closed (see *ante* p 86), either party may give notice of trial for the next sitting of the Court, which shall be holden at the place named for the trial, not less than ten days thereafter: and if the plaintiff does not give notice of trial, where the pleadings are closed six weeks before the commencement of such sittings, the defendant may move to dismiss the action for want of prosecution. (*Rule 255*). A plaintiff cannot, before joinder of issue has been filed, or the time for amendment has elapsed, give notice of trial (*Schnieder v. Proctor*, before Dalton, Q. C., 23rd September, 1881.)

The notice of trial must be served ten days before the commencement of the sittings (a) unless the party to whom it is given, has consented to take short notice of trial, or is bound by order to accept less. Short notice of trial is a five days' notice. (*Rule 259*.)

The notice of trial is to state whether it is for the trial of the action, or issues therein. For form of notice of trial see *Form No. 27*.

It may be served in the same manner as a pleading. (See *ante* p. 82.)

A notice of trial cannot be countermanded except by consent. (*Friendly v. Carter*, before Dalton, Q. C., 23rd September, 1881, affirmed on appeal, by Osler, J., 29th September, 1881.)

Entry of Action for Trial.—The cause is not to be entered for trial, until after notice of trial has been given. (*Rule*

(a) The former rule requiring an additional two days where service is effected on a Toronto agent, is no longer in force. (*Lumsden v. Davis*, before Dalton, Q. C., 23rd September, 1881.)

260.) It may then be entered by either party. If both parties enter it, the action is to be heard in the order of the plaintiff's entry. (*Rule 261.*)

How to be Entered.—The action is to be entered for trial by delivering to the proper officer a *præcipe*, see *Form No. 89*. If, at the place appointed for the trial, there is a *Local Registrar*,* the action is to be entered with him; if there be no *Local Registrar*, then it is to be entered with the *Deputy Clerk of the Crown* (*Rule 265*); unless the action be one assigned to the Chancery Division, and the action is to be tried at a special sittings to be held for the trial of actions in the Chancery Division (see *Rule 263*), in which case the action is to be entered with the *Deputy Registrar*. (*Rule 266.*) But in actions pending in the Chancery Division, which are entered for trial with a *Deputy Clerk of the Crown*, the same fees are to be paid to the *Deputy Registrar*, as if the action had been entered with him, and the *Deputy Registrar* is to attend the trial of all such actions. (*Rule 265.*) It is presumed that in such cases the *Deputy Clerk of the Crown* cannot also collect fees for entry. In cases where fees for entry are payable to a *Deputy Registrar*, it would seem necessary to attend him and pay his fees and get his receipt on the *præcipe* for entry, and then attend the *Deputy Clerk of the Crown* and file the *præcipe* with him. As to the fees to be paid see *Rule 432*.

Where the action is to be tried in Toronto at the sittings of *Nisi Prius*, it must be entered for trial with the Clerk of Assize, (see *R. S. O. c. 50, s. 248*), and actions to be tried at the sittings of the Chancery Division in Toronto, must be entered with the *Clerk of Records and Writs*. (*J. A. s. 12.*) Actions in the Queen's Bench, or Common Pleas, Divisions, to be tried without a jury, may be entered for trial at any sittings of the Chancery Division. (*R. S. O. c. 49, s. 3.*)

* The Local Registrar is an officer who combines the offices of Deputy Registrar in Chancery, and Deputy Clerk of the Crown. (See *ante* p. 16.)

When to be entered—The action must be entered for trial, not later than the third day next before the first day of the assizes, or sittings, unless the Judge permit it to be entered at any subsequent time. (*Rule 264*).

Copy of Pleadings to be left.—On the day before the holding of the Court, the party entering the action for trial, is to deliver to the officer with whom the action is entered for trial, one copy of the whole pleadings, certified by the officer with whom the pleadings are filed, for the use of the Judge. (*Rule 262*.) This copy of the pleadings is, in substance, a record, and is so called in *Rule 170 b*. The entry of a record was formerly unnecessary in Chancery. This copy of the pleadings must be indorsed, "assessment of damages," "undefended issue" or "defended issue," as the case may be. (*Rule 267*.)

Defended, and Undefended, Actions.—Two cause lists are to be made out by the officer with whom actions are entered for trial; in one he is to place all the actions marked "assessment of damages" or "undefended issue," in the order in which they have been entered; and in the other list, all the actions marked "defended issue," in the order in which they have been entered; the Judge at the trial may take up the first list, at such time as he finds most convenient. (*Rule 267*.) There must also be separate lists of the jury, and non-jury actions; and the former actions are to be first tried, unless otherwise ordered. (*J. A. s. 46*.)

Evidence at the Trial.—In the absence of any agreement between the parties and subject to the *Rules*, the witnesses at any trial, or assessment of damages, are to be examined *vivâ voce*. (*Rule 282*.) The attendance of witnesses, and production of documents in their possession, may be procured by the issuing and service of a writ, or writs, of *subpœna*, according to the former practice. For forms of *subpœna* see *Forms* Nos. 99-102. A witness failing to attend, or remain in attendance, is now liable to be detained in custody by order of the Judge at the trial. (See *J. A., s. 83*.) For form of warrant for arrest of witness, see *Form* No. 184.

The Court may order any particular facts to be proved by affidavit, or that any particular witness, whose attendance in Court for some sufficient cause ought to be dispensed with, be examined before an Examiner, except when it appears that the witness can be produced, and his attendance is required in good faith by the other party for cross-examination. (*Rule 282.*) See further as to evidence *post* chapter xiv.

Proceedings at the Trial.—The mode of proceeding at the trial is unchanged. (See *J. A.*, s. 45). The plaintiff's counsel opens the case by stating the substance of the questions put in issue by the pleadings, and where necessary the pleadings are then read, counsel for each party reading his client's pleadings, after which the counsel for the party entitled to begin states the facts of his case and the substance of the evidence he intends to adduce, if he should think any such preliminary statement necessary; he then calls his witnesses and adduces such other evidence, if any, as he may have. Counsel for the opposite party is then entitled to state the facts of his case, and the substance of his evidence, and then proceed to adduce his evidence; the party beginning has then the right to give evidence in reply, after which no further evidence can be given except by leave of the Court.

The party on whom the affirmative of the issue lies, is usually entitled to begin, except in actions for actual damages of an unascertained amount: as a general rule, except in actions of the latter class, the party entitled to begin, is he who would have a verdict against him, if no evidence were given on either side. (*Archd. Pr.* 13th ed., 354-5).

At the close of the evidence the counsel for the party beginning usually addresses the Court, and is followed by counsel for the opposite party, and the counsel who begins has then a right to reply. (See, however, *R. S. O.* c. 50, s. 26). But if, at the close of the evidence in chief of the

party who begins, the opposite party announces that he does not intend to adduce evidence, the counsel who begins addresses the Court and counsel for the opposite party has the right of reply. (*Gibson v. Toronto Roads Co.*, 2 C. L. J. 11.)

The Judge may, at, or after the trial, direct that judgment be entered for any, or either party, or adjourn the case for further consideration (*Rule 273*); but he cannot reserve the case, or any point in it, for the opinion of a Divisional Court. (*J. A.*, s. 28).

Facts omitted to be proved, may be proved at some future time, by leave.—Except in actions for libel, whenever, through accident, or mistake, any party omits to prove some fact material to his case, the Judge may proceed with the trial, subject to such fact being afterwards proved, at such time, and subject to such terms; and conditions, as to costs and otherwise, as the Judge shall direct; and if the case is being tried by a jury, the Judge may direct the jury to find a verdict, as if such fact had been proved, and the verdict is to take effect on such fact being afterwards proved as directed; and if not so proved judgment is to be entered for the opposite party, unless the Court, or a Judge, otherwise orders. (*Rule 271*.) But it seems open to doubt whether a jury sworn to give a verdict according to the evidence, could be compelled to give a conditional verdict, as here provided. The provision of *Rule 271* will no doubt, in any case, be beneficial in cases tried before a Judge alone.

Amendments.—(See *post* chapter xx.)

Non-appearance of Defendant.—If the defendant does appear, when an action is called on for trial, the plaintiff may prove his claim, so far as the burden of proof lies on him. (*Rule 288, J. A.*, s. 44.) But the proof that his pleadings are true will not alone entitle him to judgment, unless the facts proved, are also sufficient in point of law to entitle him thereto. Heretofore in actions of ejectment

if the defendant did not appear, the plaintiff was entitled to a verdict without any proof (*R. S. O. c. 51 s. 32*); but now actions for recovery of land stand on the same footing as other actions in this respect. The plaintiff is not bound at the trial, to prove service of the notice of trial. (*Charlton v. Dickie*, 13 Ch. D. 160.) But if the notice of trial have not been duly served, the verdict or judgment may be set aside, and it would seem, on entering judgment an affidavit of service of the notice of trial is necessary when any of the defendants have not appeared. (See *Form No. 156*.)

Non-appearance of Plaintiff.—If the defendant appears, and the plaintiff does not appear, the defendant is entitled to judgment dismissing the action, with costs, (*Eldridge v. Burgess*, 7 Ch. D. 411,) but if he have a counter claim he may prove such counter claim so far as the burden of proof lies on him, (*Rule 269*), and if the facts proved are sufficient in point of law to entitle him to judgment (see *J. A. s. 44*), he may recover judgment therefor. The defendant need not prove service of the notice of trial on him. (*James v. Crow*, 7 Ch. D. 410.)

Verdict, or Judgment, obtained by default may be set aside.—A verdict, or judgment, obtained where one party has not appeared, may be set aside by the Court, or a Judge, either on motion at the assizes, or sittings, at which the trial takes place, or at Toronto. (*Rule 270*.) It would seem to be intended that the motion, if made at Toronto, should be made at the ordinary sittings of a Judge in Court for hearing motions, and should be made promptly, and on notice to the opposite party.

Withdrawal of Record.—After the action is entered for trial "the Record" cannot be withdrawn by the plaintiff, nor can he then discontinue his action, wholly, or in part, except by leave of the Court, or a Judge; but such leave may be granted before, at, or after, the trial, upon such terms as may seem fit. (*Rule 170 b*.) But the Record

may be withdrawn by either party on producing to the officer a consent in writing signed by the parties (*Rule 171*); or, it is presumed, by their solicitor.

The Court, or a Judge, may, on the application of a defendant, in like manner allow him to withdraw, or strike out, the whole, or any part, of his defence, or counter claim. (*Rule 170 c.*)

Nonsuit.—A plaintiff may be nonsuited, in the same manner as under the former practice at law. Formerly a judgment of nonsuit was no estoppel to any subsequent action for the same cause, but now it is equivalent to a judgment for the defendant upon the merits, unless the Court, or Judge, otherwise directs. (*Rule 330.*)

Adjournment of Trial.—The Judge has power to adjourn the trial as he may think proper. (*Rule 272*). Formerly the absence of a necessary and material witness, where the party had used due diligence to secure his attendance, was generally sufficient ground for obtaining a postponement, and in such cases the costs of the adjournment were, in equity, costs in the cause, (*Pattison v. McNab*, 12 *Chy.* 483), but the motion had to be made promptly, or the applicant might be ordered to pay the costs of the application and adjournment. (*McDonald v. McMillan*, 22 *Chy.* 362). In all the other cases of adjournment the costs were in the discretion of the Judge.

Duty of Registrar at the Trial.—The Registrar, or other officer present at the trial, is to enter in a book, and indorse on the copy of the pleadings delivered for the use of the Judge, all findings of facts as the Judge at the trial, may direct to be entered, the directions, if any, of the Judge as to judgment, and all certificates, if any, granted by the Judge, (*Rule 274*), *e. g.*, for immediate execution, &c., &c. The indorsement so made, or a certificate of the officer making them, or a certificate of the Judge is to be a sufficient authority to the proper officer for entering judgments, to enter judgment accordingly. (*Rule 275.*)

Practical Directions.—The verdict of the jury having been rendered, it appears to be necessary that the direction of the Judge should be obtained either at the trial, or at some future time, that the judgment should be entered, though the *Rules* are not very explicit as to whether this is in all cases necessary. (See *Rule 273*.) Where the case is tried by a jury, a certificate for immediate execution is still necessary in order to entitle the successful party to enter judgment before the time for moving for a new trial has expired. (See *R. S. O. c. 50, s. 299*.) In cases tried by a jury, the successful party will now, in all cases, be entitled to full costs, unless otherwise expressly ordered by the Judge. (See *Rule 428*.) The finding of the jury, if any, or of the Judge, upon the issues, is to be indorsed as we have seen by the officer attending the trial, on the copy of the pleadings which is delivered as a record. No provision is made for the delivery of this out to the party in whose favour the verdict, or judgment, is rendered; but it may be presumed that this copy of the pleadings will generally be dealt with as the record was formally, and its delivery will be governed by the same rules. (See *R. S. O. c. 50, ss. 279, 280*.)

Formerly, however, a judgment could not be entered at law without the production of the record; but now either the production of the copy of the pleadings, with the indorsements thereon above referred to, or a certificate of the officer present at the trial, or of the Judge who tries the action, of the findings, is to be sufficient authority for the entry of judgment. (*Rule 275*, but see *Rule 329*.)

In actions for debts, or damages, or the recovery of land, or the detention of goods, &c., the judgment will be entered very much according to the former practice at law, with this exception that the judgment may now be entered before the costs are taxed, and the amount of the costs may be subsequently inserted in the judgment. (*Arch. Pr.*, 13th ed., 463.) In actions, however, brought in respect of claims formerly within the exclusive jurisdiction of the

Court of Chancery, the terms of the judgment will, in some cases, be required to be settled by one of the *Judgment Clerks*, in the same manner that decrees in Chancery were formerly settled, (see *Chy. O.* 10-13, and *Rule 416*,) and the form of judgment in the latter class of cases will be very similar to a decree, under the former Chancery practice. (See *Form No. 156*.) As to entry of judgment, see *post* chapter xii.

3. MOTIONS FOR NEW TRIALS.

(a) *Where Action tried by a Judge alone.*

Where Action tried by a Judge alone.—Where the case is tried by a Judge without a jury, the verdict, or judgment of the Judge can in certain cases be called in question by an appeal to the Court of Appeal, (*J. A. s. 37*, and see *ante* p. 3,) or by motion to a Divisional Court, to set aside the judgment and enter another. (*Rule 317*, see however *Oastler v. Henderson*, 2 Q. B. D. 575; 37 L. J. 22.) Even where the application is based upon extrinsic facts which do not controvert the correctness of the judgment rendered upon the law, or evidence, *e. g.*, surprise, or the discovery of fresh evidence by the party moving, the motion must in England be made to the Court of Appeal. (*Oastler v. Henderson*, *supra*.)

(b) *Where Action tried by a Jury.*

Time for moving.—Where any party desires to move for a new trial in any action which has been tried by a jury, he must move within the first four days of the sittings of the Divisional Court for the hearing of such applications, which may take place next after the trial (*Rule 308*);—

Or if the decision of a question raised at the trial is reserved, and is not given until such next sittings of the Divisional Court, the motion must be made within ten days after the decision, if the Divisional Court's sittings continue so long, and if not, then within the first four days of the next sittings. (*Rule 309*);—

Or where the trial takes place, during the sittings of the Divisional Court to which the application for the new trial is to be made, then within six days after the verdict is rendered, if the sittings of the Divisional Court continue so long, and if not, then within the first four days of the next sittings. (*Rule 309b.*)

The sittings of the Divisional Courts for the purpose of hearing applications for new trials in actions which have been tried by juries, take place at the times at which the sittings in term were formerly held, (*Rule 480,*) except in the Chancery Division, where such sittings are only to be held when the Judges of that Division find it necessary for the due despatch of business in that Division.

Where motion to be made.—The motion is to be made to the Divisional Court of the Division of the High Court in which the action is pending. (*J. A. s. 25.*) A Divisional Court is constituted of two or more Judges, one or more of whom (when practicable) is to be a Judge of the particular Division to which the business brought before such Court is assigned, but any Judge of the High Court is empowered to sit in any Divisional Court. (*J. A. ss. 29, 30.*) The sittings of the Divisional Courts for all the Divisions are regulated by *Rule 480.*

How to be made.—The party moving must apply for an order *nisi* calling upon the opposite party to shew cause at the expiration of eight days from the date of the order, or so soon thereafter as the case can be heard, why a new trial should not be granted. (*Rule 308,* and see *Rule 310.*)

Service of order nisi.—A copy of the order *nisi* is to be served on the opposite party within four days after it is made, (*Rule 310.*) The order may be served in the same manner as a pleading. (See *ante* p. 92.) The order *nisi* is a stay of all proceedings in the action, unless the Court otherwise order, as to the whole, or any part of the action. (*Rule 313.*)

Setting down for argument.—It is probable that motions of this kind will have to be set down for argument according to the former practice at law.

Argument of application.—The counsel for the party obtaining the order *nisi* has the right to begin, and the right of reply. (*Rule 314*).

Judgment on the application.—The Court may grant or refuse the application in its discretion; but a new trial is not to be granted on the ground of misdirection, or improper admission, or rejection, of evidence unless the Court is satisfied, that some substantial wrong, or miscarriage, has been thereby occasioned; and if it appear to the Court that such wrong, or miscarriage, if any, affects part only of the matter in controversy, the Court may direct a new trial as to that part, and give final judgment as to the other. (*Rule 311*.) A new trial may be directed, as to part of the matters in question in an action without interfering with the finding or decision as to any other matter. (*Rule 312*.) Where the Court is of opinion that upon the findings of the jury the judgment entered or directed to be entered, is wrong, it may direct the proper judgment to be entered without ordering a new trial. (*Rule 321; Hamilton v. Johnson*, 5 Q. B. D. 263): and where the application for a new trial is based on that ground, it may be made to the Court of Appeal (*J. A. ss. 28, 37, Davis v. Jones*, 36 L. T. 415.)

Where any action, or issue, is tried by a jury, and a new trial is directed, and the party obtaining the new trial succeeds on the second trial, he is entitled to the costs of the first trial and of the motion for the new trial, unless upon application made at the trial, for good cause shewn, the Judge before whom the action or issue is tried, or the Court, shall otherwise order. (*Rule 428*, and see *Green v. Wright*, 2 C. P. D. 354, 36 L. T. 365, where the new trial was granted on the ground of misdirection.)

(c) Motion to set aside Judgment.

Motion to set aside Judgment ordered at the Trial, and to enter another Judgment.—Instead of moving for a new trial, where any party is dissatisfied with the judgment directed to be entered at, or after, the trial of any action by a jury, on the ground "that the judgment directed to be entered is wrong by reason of the Judge having caused the finding (a) to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them," (*Rule 316*); or where, for any reason (b), he is dissatisfied with the judgment ordered to be entered in any action tried before a Judge without a jury, (*Rule 317*), he may, without leave reserved, move to set aside the judgment and enter any other judgment. (*Rules 316-7*). The words quoted from *Rule 316* appear somewhat obscure, but their effect, as interpreted by judicial decisions, appears to be, that where any party to an action, which has been tried before a jury, does not dispute the correctness of the finding of the jury, but contends that the judgment ordered by the Judge to be entered thereon is wrong, he may apply to set aside the judgment, and to enter the judgment which he contends the finding of the jury warrants. Applications of this kind being in effect appeals from the Judge, may be made to the Court of Appeal. (*J. A. s. 37, Davis v. Jones*, 36 L. T. 415,) and also to a Divisional Court. (*Rule 317*.) Whenever the correctness of the jury's finding is called in question, a motion for a new trial should be made to a Divisional Court. (*Davies v. Felix*, 4 Ex. D. 32.)

4. MOTIONS FOR JUDGMENT.

In what Cases Motion for Judgment may be made.—Where no other mode is provided by the *Rules* for obtain-

(a) Probably the word "Judgment" is here intended.

(b) *Sed Quære*, *Rule 317* seems only to apply to cases where the correctness of the Judge's finding on the facts is not disputed. The former right of appeal from a single Judge to the Full Court, however, does not appear to be expressly taken away. (*J. A. s. 12.*)

ing judgment, the judgment of the Court is to be obtained by motion for judgment. (*Rule 315.*) There are, however, certain particular cases in which the *Rules* expressly provide that judgment may be obtained in this manner, viz. :

On Admissions in pleadings, or in the examination of any party.—Any party to any action may, at any stage thereof, apply to the Court for such order as he may, on any admissions of fact in the pleadings, or in the examination of any other party, (see *post*, chapter xix.,) be entitled to, without waiting for the determination of any other question between the parties. (*Rule 322.*)

Where Evidence is only Documentary.—Any party to an action may in like manner apply, at the close of the pleadings, where the only evidence to be adduced in the action consists of documents, and such affidavits as are necessary to prove their execution, and identity, *without the necessity of any cross-examination.* (*Ib.*, and see *Chy. O. 270.*)

Where all the evidence is to be given by affidavit.—So also the cause may be heard on motion for judgment, where all parties agree in writing, that all the evidence in the action may be given by affidavit, and neither party desires to cross-examine any of the deponents. (*See Rule 306.*)

Where Infants interested, and evidence is only necessary as against them.—Any party to an action may in like manner, move for judgment at the close of the pleadings, where infants are concerned, and evidence is necessary, so far only as they are concerned, for the purpose of proving facts which are not disputed. (*Rule 322.*)

Where issues of fact in an action have been determined.—Where issues of fact have been determined in an action, and no direction has been made by the Court, or a Judge, for the entry of judgment, the plaintiff may as soon as such issues have been determined, set down the action on motion for judgment, and give notice to the other parties within ten days after the issues have been determined, and if he do not do so, then any defendant may do so. (*Rule 318.*)

By leave of Court.—Where at any time after the writ of summons has been issued, it is made to appear to the Court, or a Judge, that it will be conducive to the ends of justice to permit a notice of motion for judgment to be served; the Court, or a Judge, may so direct, and where such permission is granted, such directions are to be given as to the service of the notice of motion and filing of the affidavits as may be expedient. (*Rule 324.*) But such an application will be granted only where some special ground is shown. (*Davidson v. McKillop*, 4 Chy. 146.) Where some only of the issues have been tried or determined in an action, if any party considers that the result of such trial or determination, renders it unnecessary to determine the other issues, or that the determination of the latter should be postponed, he may apply for leave to set down the action on motion for judgment, without waiting for the determination of such other issues; and the Court, or Judge, may grant such leave, upon, or without, terms. (*Rule 319.*)

Any motion pending before the Court, or a Judge, may, by the direction of the Court, or a Judge, be turned into a motion for judgment, or a hearing of the cause or matter. And the Judge may make order as to the time and manner of giving evidence. And with respect to the further prosecution of the action as the case may require. (*Rule 323.*)

How made.—The motion is to be made on notice to the opposite parties. (*Rule 406.*) (a) The notice is to be served two clear days before the day named for hearing the motion, unless special leave be given by the Court, or a Judge, to give, (*Rule 407*), or the parties consent to take short notice. The motion must be made returnable on a day on which the Court sits for hearing motions of that kind. For form of notices of motion for judgment, see *Daniels's Forms*, 4th ed., No. 821, *Chitty's Forms*, 11th ed.,

(a) Under the former Chancery practice a cause might be heard *pro confesso*, without notice. Notice of motion, or judgment, must now be given in all cases. Where the defendant has not appeared, the notice may be posted in the office,

pp. 347-8. The notice may be served in the same manner as a pleading. (See *ante* p. 92.)

Except during vacations, one of the Judges of the Queen's Bench, and Common Pleas, Divisions will sit on Tuesday and Friday in each week, for hearing motions for judgment in actions in these Divisions, and one of the Judges of the Chancery Division will sit on Wednesday in each week, for hearing such motions in the Chancery Division. Motions must be set down for hearing, and will be called on to be heard in the order in which they are set down. (See *Rules H. C. J. I.-IV.*; *Chy. O.* 593; *Rules* 319, 320.)

When to be made.—The motion for judgment must be made within a year from the time the party first became entitled to move. The action cannot afterwards "be set down" on motion for judgment without the leave of the Court, or a Judge. (*Rule* 320).

Hearing of Motion.—According to the former practice in Chancery on motions for decree, from which the procedure laid down by the *Rules* is no doubt taken, it was customary for the plaintiff's counsel to open the case, with a short statement of the nature of the suit and the questions involved. The pleadings and evidence were then read—each counsel reading the pleadings and evidence of his own client. Counsel for the plaintiff then argued the cause and stated the decree claimed for the plaintiff. Counsel for the defendant were then heard, and counsel for the plaintiff had the right to reply. On motion for judgment this practice will probably be continued.

Judgment.—The Court may grant or refuse the application, or, without doing either, give directions for the examination of witnesses, or with respect to the further prosecution of the suit, as the case may require, or it may direct the motion to stand for further consideration, and direct issues to be tried and determined, and such accounts to be taken, and enquiries to be made, as it may think fit. (See *Rules* 321, 322, 324 *a*).

(a) Special Cases.

Where the questions, or any of them, in difference between parties are simply questions of law, the parties may obtain the adjudication of the Court on such questions in certain cases, by stating a special case as it is called, and in certain other cases, the Court itself may direct questions of law to be decided in this manner. Where this mode of trial is resorted to, a statement of the facts is agreed upon, or settled by a Judge, and the questions of law upon which the judgment of the Court is desired are stated. By the *Rules* provision has been made for the trial of actions, or of questions arising in actions, in this way.

Where Special Case may be stated by Consent.—The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. (*Rule 248.*)

The parties to a special case may, if they think fit, enter into an agreement in writing, that on the judgment of the Court being given in the affirmative, or negative, of the question or questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with, or without, costs of the action; and the judgment of the Court may be entered for the sum so agreed or ascertained, with, or without, costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal. (*Ib.*)

When Special Case may be ordered by the Court.—If it appears to the Court, or a Judge, either from the statement of claim, or defence, or reply, or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given, or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court, or Judge, may make

an order accordingly ; and may direct such question of law to be raised either by special case, or in such other manner as the Court, or Judge, may deem expedient ; and all such further proceedings as the decision of such question of law may render unnecessary, may thereupon be stayed. (*Rule 249.*)

Form of Special Case.—Every special case stated in an action, or in any proceeding incidental to an action, is to be divided into paragraphs, numbered consecutively, and is to state concisely such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. But upon the argument of such case, the Court, and the parties, are at liberty to refer to the whole contents of such documents, and the Court may draw from the facts, and documents, stated in any such special case, any inference, whether of fact or law, which might have been drawn therefrom, if proved at a trial. (*Rules 248, 253.*)

Every special case is also to be signed by the several parties or their solicitors, and is to be filed by the plaintiff. (*Rule 250.*) The signature of counsel is unnecessary. (*Hare v. Hare*, W. N. 1876, 44.)

Setting down for Argument.—Where a married woman, infant, or person of unsound mind, is a party to any special case, it cannot be set down for argument without the leave of the Court, or a Judge, and the application for such leave must be supported by evidence that the statements in the case, so far as they affect the married woman, infant, or person of unsound mind, are true. (*Rule 251.*)

Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, see *Form No. 87*, and when any married woman, infant, or person of unsound mind, is a party to the action, he must also produce a copy of the order giving leave to enter the same for argument. (*Rule 252.*)

When the case is in the Queen's Bench, or Common Pleas, Divisions, it must be entered with the Registrar of

the Division. In cases in the Chancery Division, it must be entered with the Clerk of Records and Writs.

The special case may be set down in the Queen's Bench, and Common Pleas, Divisions, to be heard on any Tuesday, or Friday, (*Rule H. C. J. II.*, see App. C,) and in the Chancery Division on any Wednesday. (*Rules H. C. J. III.*, IV., see App. C; *Chy. O.* 593.) Except where any such day falls in vacation, (*Rules H. C. J. I.*, III., see App. C,) or on a non-judicial day. The case must be entered, and notice thereof given to the opposite party, six days before the day on which it is to be heard. (*Rule H. C. J. V.*, see App. C.) A copy of the special case must be left by the plaintiff with the Registrar of the Division, for the use of the Judge, two days before the argument. (*Rule H. C. J. VI.*, see App. C; and see *Rule* 250.)

5. TRIALS BEFORE REFEREES, AND ARBITRATORS.

Trials before Referees.—In addition to trials in the ordinary way, before a Judge, actions, or questions arising in actions, may, in certain cases, be referred for trial before *Official Referees*, and others.

Particular Questions which may be referred to Referees, &c.—Subject to any *Rules* of Court, and to such right as may exist to have particular cases submitted to the verdict of a jury, (see *R. S. O. c. 50 s. 252.*) any question arising in any cause or matter, other than a criminal proceeding by the Crown, before the High Court of Justice, or before the Court of Appeal, may be referred, by the Court, or by any Divisional Court, or Judge, before whom such cause or matter may be pending, to a Judge of a County Court, or to an *Official Referee*, or to any other person agreed on by the parties, for inquiry and report; and the report of such Referee may be adopted, wholly, or partially, by the Court, and may, if so adopted, be enforced, as a judgment, by the Court. For form of order of reference, see *Form* No. 130; and see *Rule* 247, as to effect of order in that form.

Actions which may be Referred to Referees for Trial.—
Any cause, or matter, other than a criminal proceeding by the Crown, before the High Court,—

(1) In which all parties interested, who are under no disability, consent thereto, and also,—

(2) without such consent, any such cause, or matter, requiring any prolonged examination of documents, or accounts, or any scientific, or local, investigation, which cannot, in the opinion of the Court, or a Judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers; or:—

(3) Any question, or issue of fact, or any question of account arising in the cause, or matter,—

may be ordered by the Court, or a Judge, to be tried either before a Judge of a County Court, or before an *Official Referee*, or, if the parties so agree, before a special referee. All such trials before referees are to be conducted in such manner as may be prescribed by *Rules* of Court, and subject thereto in such manner as the Court, or Judge, ordering the same shall direct. (*J. A.*, s. 48; and see *Rules* 276–281.) For form of order of reference, see *Form* No. 131; and see *Rule* 247, as to effect of an order in that form.

In all cases of a reference to, or trial by Referees, under the Act, the Referees are to be deemed to be officers of the Court, and are to have such authority, for the purpose of the reference, as shall be prescribed by *Rules* of Court, or, subject to such *Rules*, by the Court, or Judge, ordering such reference, or trial; and the report of any Referee, upon any question of fact, on any such trial, is, unless set aside by the Court, equivalent to the verdict of a jury. (*J. A.*, s. 49; and see *Rules* 245, 247.)

In respect to all such proceedings before Referees, and their reports, the Court, or Judge, has, in addition to any other powers, the same, or the like, powers as are given to any Court whose jurisdiction is vested in the High Court,

with respect to references to arbitration, and proceedings before arbitrators, and their awards, and appeals therefrom, respectively, by the *Common Law Procedure Act*, or other Acts. (*J. A.*, s. 50.)

Trials before Referees.—The proceedings on trials before Referees, are to be conducted, as nearly as may be, as trials before a Judge; witnesses may be subpoenaed, and the trial is to proceed *de die in diem*, unless otherwise ordered: but the omission to sit *de die in diem* will not invalidate the proceedings. (*Robinson v. Robinson*, 35 L. T. 237.) The Referee, however, has no power to commit; or to order, a witness to be attached. The tribunal of the Referee is not a public Court of Justice. See further for proceedings on such trials *Rules* 245, 276–281.

Trials before Arbitrators.—Provision is also made by *Rule* 246, in reference to trials before arbitrators. An arbitrator to whom any action, or matter, has been ordered to be referred, has now all the powers of a Judge of the High Court, as to certifying, and amending. The witnesses may be examined on oath or affirmation, and the parties are to produce all documents, in their custody, or power, relating to the matters in difference. No action is to be brought by either party against the arbitrator, and if either party wilfully delay the making of the award, the arbitrator may award costs against him. If the validity of the award be disputed, or a motion be made to set it aside, the Court, or Judge may, refer back to the arbitrators the matters referred, or any of them, for reconsideration. In the event of an arbitrator refusing, or declining, to act, a Judge of the High Court may, on the application of either party, appoint a new arbitrator. Unless otherwise ordered, final judgment may be signed on the award, after the expiration of fourteen days after service of a copy on the opposite party. (*Rule* 246.) All orders of reference to arbitrators are to be deemed to contain the provisions set out in *Rule* 246, but may contain variations therefrom. (*Rule* 247.)

CHAPTER XII.

PROCEEDINGS AFTER TRIAL, OR HEARING, OF ACTION.

Entry of Judgment.

The action having been tried before a Judge, with or without a jury; or heard and disposed of on motion for judgment; the next step in the cause is the entry of the judgment (*a*).

When, and where, to be entered.—Where the action has been tried by a jury, unless the Judge certifies that execution ought to issue forthwith, or at some day to be named in the certificate, the judgment cannot be entered until the time for moving for a new trial has expired. (*Rule 309b.*) As to when the time for moving for a new trial expires, see *ante* pp. 126, 127. Where the action has been tried by a Judge alone, either at the Assizes or other Sittings, or has been heard on motion for judgment, the judgment may be entered forthwith, unless the entry of it be expressly stayed.

In actions for the recovery of debts, or damages, or for the recovery of land, or goods, or other causes of action which were formerly cognizable at law, the mode of entering judgment will be similar to the former practice at law, and the judgment will be prepared by the solicitor, (see *Forms* Nos. 155, 156,) except that judgment may be at once signed without waiting for the taxation of the costs, and the amount of the costs when taxed may be subsequently inserted on the certificate of the *Taxing Officer* being produced. Notice of taxation of costs must be given.

(*a*) The phraseology of the *Rules* on the subject of judgments is not uniform, see *Rules* 78, 79, 332, 336, where they are called "judgments," "orders," and "decrees." (See *J. A. s.* 91.)

The judgment may be entered in the office where the pleadings are filed. (*Rule 50*). And possibly also in any case after a trial, or motion for judgment, at the principal office of the Division in Toronto, even in actions commenced in an outer county. This was the construction placed on *R. S. O. c. 50, s. 12*, and *Ib., c. 51, s. 11*, but until the practice has been settled in some way, it cannot be considered clear that the judgment can be entered in any office except that in which the pleadings are filed. In the outer counties the officer who enters the judgment, will tax the costs, in Toronto the costs are to be taxed by one of the *Taxing Officers*. (*Rule 438*.) Where, however, the judgment is of a special character, its form and terms may be required to be first settled by one of the *Judgment Clerks*. (*Rule 416*.) In such a case the solicitor for the party desiring to have the judgment drawn up, must obtain a direction from the Judge to the *Judgment Clerk* to settle the judgment, and he must then proceed in the manner provided by the former practice in Chancery for settling the minutes, and passing, decrees. (See *Chy. O. 10-13*.) The form of the judgment in such a case having been settled, it must then be taken to the proper officer to be entered.

Judgment, how entered.—It is to be regretted that the *Rules* are not more explicit than they are as to the practice to be pursued on entering judgment. All the Divisions of the High Court have now to deal with two classes of cases in which the mode of entering judgment, according to the former practice, was widely different. There is the class, founded upon causes of action formerly cognizable at law, and the other class founded upon causes of action formerly exclusively cognizable in equity. Under the former practice at law a judgment roll, which was a copy of all the pleadings in the suit, winding up with a statement of the trial, if any, and result of it, and the judgment of the Court thereupon, was prepared by the attorney; and on entering judgment this document was filed with the officer, who signed a memorandum on the

margin of it, and entered a minute of it in a book kept for that purpose (see *R. S. O. c. 50, s. 302*), and the judgment was thereupon entered. The judgment in Chancery, which was called a decree, contained no copy of the pleadings, and was simply a formal statement of the adjudication of the Court upon the matter in controversy; a draft of the decree, called the minutes, was first prepared, whenever it was of a special nature, and an appointment to settle it was obtained from the proper officer, and served on the opposite party. Where the decree was of a simple character the appointment to settle was dispensed with. The draft having been settled was then engrossed and signed by the Registrar, or Assistant Registrar, of the Court, and was then entered *verbatim* in a book kept for the purpose, and after it had been carefully compared with the entry so made, it was delivered out to the solicitor. No record of the decree, except that in the book, being retained by the Court. The *Rules* provide that every judgment, without distinction, is to be entered in a book. (*Rule 318*). And the form of the judgment is also changed, and is now confined to the adjudication of the Court on the matter in controversy, without setting forth the pleadings in the action, as was formerly required at law. (See *Forms 147, 167*). In these respects the practice which has hitherto prevailed in Chancery appears to be adopted. The question remains, however, whether or not the judgment when entered, is to be delivered back to the solicitor. This, as we have seen, though according to the former Chancery practice, would be contrary to that of the Courts of Law. The *Judicature Act*, s. 12, provides that where no special provision is made, the jurisdiction of the High Court shall be exercised, so far as regards procedure and practice, as nearly as may be, in the same manner as the same might have been exercised by the respective existing Courts, as if the Act had not been passed. It can hardly have been intended, however, that in an action on a promissory note, in the Chancery Division, the judgment is to be entered in one way, and in other Divisions of the High Court, in

another way; nor yet that a judgment in an action for foreclosure, or specific performance, is to be entered in one way, in the Chancery Division, and in another way, in the other Divisions, especially as in about one half of the local offices, the same officer is to act for all the Divisions. Nor could it have been intended, that judgments in the Chancery Division are to be entered in one way at Toronto, and in another in the local offices of that Division; but whether the *Rules* on this point are at present sufficient to assimilate the practice in the different Divisions seems doubtful.

The provisions of *R. S. O. c. 50, ss. 302, 303* are applied as nearly as may be to *Deputy Registrars* as well as *Deputy Clerks of the Crown*. (See *Rule 419*.) These sections provide for the entering of a minute of the judgment in a book or docket, and also for the officer sending to the principal office of the Court at Toronto, all judgment rolls, and all papers belonging thereto, within three months of the entry of the judgment.

These provisions though applied in terms to the local officers, would seem to furnish some sort of clue to the procedure intended to be adopted in all offices.

It seems evident that in every case where a judgment is entered in a local office, the judgment from which he makes the entry in his book, must be retained by the local officer, for the purpose of being transmitted to the principal office in accordance with *R. S. O. c. 50, s. 303*. What then is to be the practice where the solicitor also requires a copy of the judgment? Perhaps a reference to the English practice in the Common Law Divisions, may be useful in assisting us to arrive at a conclusion.

In England, on entering judgment in the Common Law Divisions, two copies of the judgment are produced, one is retained, and entered by the officer, the other copy is authenticated by the officer, and returned to the solicitor. (*Arch Pr.* 13th ed. 462-3.) Probably this procedure, or

some modification of it, will prevail under our *Rules*. It is not necessary in every case that a copy of the judgment should be in the hands of the solicitor: it is only necessary, as a general rule, in that class of cases where some reference, or account, is directed, or further proceedings have to be taken in the action, other than the issue of an execution. In all simple cases for the payment of money, the recovery of land, &c., the delivery of one copy of the judgment to the officer would seem all that is necessary, but in other cases where the judgment is in the nature of a decree under the former practice, the solicitor will generally require to have a copy of the judgment in his possession, for the purpose of the future proceedings in the action.

Probably, therefore, wherever the solicitor desires to retain a copy of the judgment in his hands, it will be necessary for him, at the time of entering judgment, to produce two copies of the judgment, one of which can be authenticated by the signature, or initials, and seal of the officer entering the judgment, and returned to the solicitor, and the other will be retained by the officer.

Date of Judgment.—Where the judgment is pronounced by the Court, the entry of judgment is to be dated as of the day on which such judgment is pronounced, and is to take effect from that date. (*Rule 326.*) In other cases the judgment is to be dated as of the day on which the requisite documents are left with the proper officer for the entry of judgment, and is to take effect from that date. (*Rule 327.*)

Certain directions to be implied in Judgments though not specifically set forth therein.—Under judgments, or orders, directing all necessary enquiries to be made, accounts taken, costs taxed, and proceedings had for *redemption*. (See *Form No. 170.*) The Master is to take the usual accounts, and appoint the usual time for redemption; and on payment, the defendant is to re-convey, and deliver up documents,

and in default of payment, the defendant is to be entitled *ex parte* on application in Chambers, to a final order of foreclosure, or an order dismissing the bill with costs, and subsequent proceedings may be had in the same action, to foreclose any subsequent incumbrancers. (See *Rules* 332-336.)

In actions for *foreclosure*, or *sale*, the judgment is to be nearly in the same form as the former decree in Chancery in like cases, (see *Forms* Nos. 168, 169), and will have the like effect. (See *Chy. O.* 441-454.)

Wherever by any judgment, a *sale* is directed, the Master may, without any special directions in that behalf, sell the whole or a competent part of the property, and may sell by auction, tender, or private contract, or part by one mode or part by another; and may, at the time of settling the advertisement, if desired, fix a reserved bidding, which must be notified in the conditions of sale; and the Master is to settle all necessary conveyances in case the parties differ, or in case there shall be any parties, interested in the sale, under any disability except coverture. (*Rule* 331.)

Mistakes in, may be corrected without Appeal.—Clerical errors, or errors from accidental slip, or omission, in any judgment, may be corrected on motion, without appeal, (*Rule* 338, and see *post* chap. xx.)

An omission of counsel to ask for costs which had been reserved, may be supplied: (*Fritz v. Hobson*, 14 Ch. D. 542,) and mistakes in orders made by consent, may be rectified. (See *Merchants Bank v. Grant*, 3 Chy. Ch. R. 64; and see *Eadie v. McEwen*, 14 Chy. 404; *Thompson v. Dodd*, 15 C. L. J. 129;) where anything but the judgment delivered by the Judge and the judgment drawn up are necessary to be looked at, the the motion to amend should be made to the Court. (*Lapp v. Lapp*, 3 Chy. Ch. R. 234.)

CHAPTER XIII.

EXECUTION — EXAMINATION OF JUDGMENT DEBTOR —
ATTACHMENT OF DEBTS.1. *Execution.*

- (a) *When, and how, Issued.*
- (b) *Indorsements on Writs.*
- (c) *Duration, and Renewal, of Writs.*
- (d) *Execution in particular cases.*
- (e) *When Leave to Issue Execution necessary.*

2. *Examination of Judgment Debtors.*3. *Attachment of Debts.*

- (a) *Debts, Attachable.*
- (b) *Debts not Attachable.*
- (c) *Effect of Attaching Order.*
- (d) *Application to Pay Over.*
- (e) *Payment by Garnishee.*

It is expressly provided that nothing in the *Rules* 339, to 361, is to take away or curtail any right, heretofore existing, to give effect to any judgment, or order, in any manner, or against any person, or property, whatsoever. (*Rule* 360). Nor do the *Rules* affect the order in which writs of execution may be issued. (*Rule* 361). The effect of the *Rules*, therefore, seems to be to keep alive the right to issue any process of execution, which might have been issued before the passing of the Act, for the purpose of enforcing any judgment, or order, in the same manner, and order, in which it might have been formerly issued.

Every judgment, and every order, (*Rule* 357), whether obtained by parties to the action, or by any person not a

party to any action, (*Rule 358*,) may therefore be enforced by execution as formerly. The forms of the writs have been somewhat changed, and the names by which the writs were formerly called have not in all cases been retained. In some cases the remedy by execution has been enlarged, as for instance, the right to issue writs of sequestration is now extended to all the Divisions, and the right is now given to issue execution against a partnership in the name of the firm, instead of against the individuals who composed the firm, as was formerly the practice. In some cases, before execution can be issued, the leave of the Court must be obtained, as will be presently seen.

(a) *When, and how, Issued.*

When Execution may Issue.—Generally speaking, as soon as final judgment is entered for the payment of any money, one, or more, writ, or writs, of *fieri facias*, may issue to enforce payment, unless the judgment postpones the payment to a period which has not elapsed; in which case, the writs may issue on the expiration of such period. The Court, or Judge, when giving judgment, or at any time afterwards, may stay, or accelerate, the right to issue execution. (*Rule 352*.)

Appropriate writs of execution to enforce other judgments, may be issued in like manner, on final judgment being entered, subject also to the power of the Court, or a Judge, in like manner, to stay, or accelerate, the issue thereof. (*Rules 352b 344*).

When the judgment is entered, for default of appearance to a specially endorsed writ, execution cannot be issued, until the expiration of eight days, from the last day for appearance. (*Rule 75*.)

The execution must be issued within six years from the date of the recovery of the judgment, otherwise leave must be obtained. (*Rules 355-6*).

How Issued.—The party requiring an execution is to file with the proper officer a *præcipe*, (see *Forms* Nos. 93-98), to be signed by the solicitor, or party, suing it out. (*Rule 347.*) Where an order is necessary, the order therefor, must also be produced. The officer will fill up, sign, and seal the writ and deliver it to the solicitor upon payment of the proper fees. Executions may issue from the office wherein the judgment was entered, and after the transmission of the judgment and other papers to Toronto, may, at the option of the party, be also issued at the principal office of the Division. (*R. S. O. c. 66, s. 7; Rule 419.*)

Date, and Teste.—The execution is to be dated on the day of its issue (*Rule 349*), and must be tested in the name of the President of the High Court (*Rule 9*), and must be sealed with the seal of the Court, or of the officer issuing the same. (*J. A. ss. 8 and 51*) (*a*.)

(*b*) *Indorsement on Writs.*

Indorsements.—The name and address of the solicitor suing out the writ, is to be indorsed, and if he be an agent, the name and address of his principal are also to be indorsed. If sued out by a suitor in person, it must be so stated in the indorsement, and the city, town, or other place, and also the name of the street and number of the house where he resides, must also be stated in the indorsement. (*Rule 348.*) For form of indorsements, see *Form No. 176.*

Direction to Levy.—There must also be indorsed, the usual direction heretofore required, directing the Sheriff to levy the money due, stating the amount, and interest

(*a*) Although the signature of the *Clerk of the Process* is dispensed with to writs of summons, except those issued by himself, (see *Rules 21, 24*.) there does not appear to be any express provision dispensing with his signing and sealing all writs of execution in actions in the Queen's Bench, and Common Pleas, Divisions, nor is there any express provision dispensing with the *Clerk of Records and Writs* sealing all executions issued in actions in the Chancery Division, according to the former practice.

thereon (if sought to be recovered) at six per cent, per annum from the time judgment was entered up ; but if the parties have agreed that a larger rate of interest shall be secured by the judgment, the writ may be indorsed to levy the amount so agreed, (*Rule 351.*) The interest on costs, however, only runs from the date of the certificate of taxation. (See *Form No. 175, Schroeder v. Cleugh*, 46 L. J. C. P. 365.) Poundage and sheriff's fees and expenses may be levied as formerly. (*Rule 350.*)

Return of Writ.—For procedure to compel return of writ by the sheriff. (See *R. S. O. c. 66, ss. 57-71.*)

(c) *Duration, and Renewal, of Writs.*

Duration of Writ.—All writs of execution (*Rules 344, 353*) if unexecuted, are to remain in force one year only from their issue, unless renewed.

Renewal of Writ.—Any writ, or any renewed writ, may, before its expiration, be renewed, by the party issuing it, for one year from its date, or from the date of the last renewal.

There are two ways now of renewing a writ :—

- (a) The party may procure the officer who issued it, or his successor in office, to mark it in the margin with a memorandum of its renewal. This memorandum must be under the seal of any local officer issuing the same. (*J. A., s. 51.*)
- (b) Or he may deliver to the sheriff a notice in the *Form No. 31*, signed by the party, or his attorney, having the like memorandum of renewal in the margin, signed by the officer entitled to renew the writ; and, in case the writ is renewed by a local officer, this memorandum must also be sealed with his seal of office. (*Rule 353.*)

The production of the writ so marked, or of such notice is sufficient *prima facie* evidence of the renewal. (*Rule 354.*) It would, in general, seem advisable, in all cases where practicable, to have the writ itself marked, and not trust to a notice, which may be lost, or mislaid; cases however may occur where a writ is in the sheriff's hands, and it is impossible to get it from him, in time to get it marked, it is then that the new method of renewal will be valuable. No express provision is made for filling a *præcipe* for renewal. This, however, was, under the old practice, necessary in all the Courts, and there is no express provision in the *Rules* to the contrary, and must, therefore, still be done. (*J. A.*, s. 12.)

Staying Execution.—Proceeding by *audita querela* is abolished; but any party may apply to the Court, or a Judge, for relief against an execution, on grounds which have arisen too late to be pleaded; and the Court, or Judge, may grant relief. (*Rule 359.*) In other respects, the right to move to set aside, or stay, executions for irregularity, or on any other ground which would formerly have entitled a party to move, is unchanged.

(d) *Execution in particular Cases.*

For recovery of Money.—A judgment, or order, for payment of money to any person, or into Court, may be enforced by any of the modes by which any such judgment, decree, or order, might have been enforced in any of the Superior Courts, before the Act. (*Rules 339, 340.*) *e. g.* by writs of *fieri facias*, and *renditioni exponas*, against goods, and lands, and writs of sequestration, (see *Chy. O.* 291, and *Rule 360*) where the money is to be paid into Court, the party having the carriage of the judgment, is the party entitled to issue execution. (*R. S. O.* c. 66 ss. 72-3.). These writs are to have the same force and effect, and be executed, as formerly. (*Rules 362-3.*) For forms of writs of *fieri facias*, and *venlitioni exponas*, see *Forms* Nos. 175, 176, 177.

For recovery of Land.—Judgments for the recovery of land, are to be enforced by a writ of possession; for form of writ, see *Form* No. 178. (*Rules 341, 379.*) This writ was

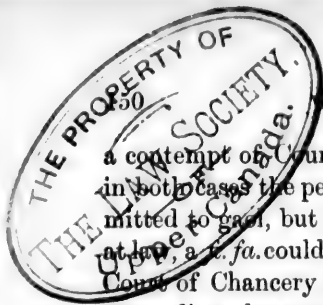
formerly called a writ of *habere facias possessionem* at law, and a writ of assistance in Chancery. The writ of possession has now the effect of both a writ of *hab. fac. pos.*, and a writ of assistance in Chancery. (*Rule 381.*) As to the difference between a writ of assistance, and a writ of *hab. fac. pos.*, (see *Maclennan*, 312). Where the judgment, or order, directs the delivery of possession to some other person, or at some specified time after service, an affidavit of due service of the judgment, or order, and that it has not been obeyed, must be filed before execution can issue, but no further order is necessary. (*Rule 380.*)

For recovery of other property, except Land or Money.—Judgments for the recovery of any property, except land or money, may be enforced (*Rule 342*) by :

- (a) Writ for the delivery of the property, (see *Forms* Nos. 179, 180, 183) to be enforced in the same way as a writ issued in an action of *detinue* under the former practice at law. (See *Rule 382.*)
- (b) Writ of attachment against the person, (see *Form* No. 181).
- (c) Writ of sequestration, (see *Form* No. 182).

To compel, or restrain, the doing of any act other than the payment of Money.—A judgment requiring a party to do, or refrain from doing, any act, other than the payment of money, may be enforced by attachment, or by committal. (*Rule 343.*) Under the former practice in Chancery it might also be enforced by sequestration, (*Chy. O.* 289, 290,) and it would seem that it may still be so enforced in the Chancery Division, (*Rule 360.*) and also, it would seem in the other Divisions. (*J. A. s. 9.*)

The expression "attachment, or by committal" is probably intended to mark the distinction which formerly existed between an attachment on a writ of *capias ad satisfaciendum*, and a committal of the Court of Chancery for



WRITS OF ATTACHMENT.

a contempt of Court, in disobeying an order of the Court, in both cases the person of the party was attached and committed to gaol, but in the case of an attachment on a *ca. sa. att. ad.*, a *te. fa.* could not issue, whereas the committal by the Court of Chancery for contempt, was in general no bar to proceeding also against the property of the offender. (*Sm. Chy. Pr.* 7th ed., p. 185.)

Writs of Attachment.—Writs of attachment against the person, are to be issued under the same circumstances, and in the same manner, and are to have the same force as heretofore, according to the practice of the Court of Chancery. (*Rule 364*; see *Chy. O.* 288.)

No such writ is to be issued without an order therefor, to be applied for, on notice to the party, against whom the attachment is to be issued. (*Rule 365.*) The notice must be served personally, unless some sufficient reason is shown for dispensing with personal service. (*Mann v. Perry*, 50 L. J. Chy. 251.) Formerly, in some cases, the writ might be issued in Chancery on *præcipe*, without an order. (See *Chy. O.* 288.) This cannot now be done. A person attached for contempt will not be detained for costs after otherwise clearing his contempt. (*Jackson v. Mawby*, 1 Ch. D. 86; *Earl of Lewes v. Barnett*, 6 Ch. D. 252: but see *Harris v. Meyers*, 1 Chy. Ch. R. 229.)

On Judgment which is Conditional.—When the judgment is to the effect, that any party is entitled to relief, subject to the fulfilment of any condition or contingency, the party, on the fulfilment thereof, and after demand made on the party against whom he is entitled to relief, may apply for leave to issue execution, and the Court, or a Judge, may so order or make other order. (See *Rule 345.*)

On Judgment against a Firm.—When the judgment is against a firm (see *ante* p. 36), the execution may issue without leave against:—

1. The firm. (See *Rule 347.*)

2. Against any person who has admitted, on the pleadings that he is a partner, or who has been adjudged to be a partner.
3. Against any person who has been served as a partner, with the writ of summons, and failed to appear,—

And by leave of the Court, or a Judge, execution may also issue against any other person, who is claimed to be a member of the firm.

When a party applies to issue execution, against a person who he claims to be a member of a firm against whom he has recovered judgment, if the liability of such person be disputed, the question of liability may be ordered to be tried. (*Rule 346.*)

(e) When leave to issue Execution necessary.

After the lapse of six years.—Where six years have elapsed from the entry of the judgment, without execution having been issued, it cannot be issued without the leave of the Court, or a Judge. (*Rule 356.*)

Where any of the parties have died.—Leave to issue execution is necessary where any change has taken place by death, or otherwise, in the parties entitled, or liable, to execution. (*Rule 356.*)

On application for leave to issue execution, trial of issue may be directed.—On application for leave to issue execution in any case in which leave is necessary, the Court, or Judge, may direct any issue or question necessary to determine the rights of the parties, to be tried in any way in which any question in an action may be tried, and may impose any terms. (*Rules 346, 356.*)

2. EXAMINATION OF JUDGMENT DEBTORS.

Examination of Debtor.—Under the former practice both at law and in equity, (*R. S. O. c. 50, s. 304 ; Ib. c. 66, s. 72*),

after a judgment, decree, or order, had been recovered, or made, for the payment of any money, the debtor might in certain cases be examined, as to his property and means of paying the debt, and also as to the property and means he had when it was incurred, and the disposition he had made thereof. He might also be examined as to the debts owing to him, with a view to their being attached to answer the judgment. This examination, however, could only be had by obtaining an order therefor in Chambers, on notice to the debtor.

The *Rules* have made an important change in the practice in this respect, and wherever the judgment is for the recovery by, or payment to, any person, of money, the party entitled to enforce the judgment, may now, without an order, examine the judgment debtor upon oath, by simply obtaining an appointment from an officer entitled to take the examination, and serving it, together with a *subpœna* requiring the debtor to attend at the time and place appointed. (*Rules* 366, 368, 369): and in case the debtor be a corporation aggregate, any of its officers may in like manner be subpœnaed, and examined touching the names and residences of the stockholders, the amount and particulars of the stock held by each stockholder, and the amount paid thereon. And also as to the debts owing to the corporation, and as to the estate and effects of the corporation; and as to the disposition made by the corporation of any property, since contracting the debt or liability, in respect of which the judgment is obtained. (*Rule* 367.)

It seems doubtful, however, whether the examination of a debtor may be had in this summary way when the money is merely payable under an order. (See, however, *Rule* 357.) Nor does it seem clear that a party who is ordered by a judgment, to pay money into Court, can be so examined. In any cases not within the *Rules*, the order for the examination must be obtained according to the former practice. (See *R. S. O. c. 49*, ss. 17, 20, and *Ib.*, c. 50, ss. 304, 6.)

Officers entitled to take Examination.—The Master of the Supreme Court, the Local Masters, the Special Examiners, the Registrars of the Queen's Bench, and Common Pleas Divisions, the Deputy Clerks of the Crown, and the Judges of the County Court of the county where the debtor resides, and the Official Referees (see *ante* p. 13), are entitled to take these examinations. (*Rule 366.*)

Where Examination to take place.—The debtor should be examined before some officer resident in the county where he resides.

How Attendance enforced.—The debtor may be served with an appointment signed by the officer before whom the examination is to take place, such service is to be made at least forty-eight hours before the time appointed for the examination, and the debtor is also to be paid the same fees as a witness. (*Rule 369.*) The service of this appointment, is to have the same effect, as the service of a rule, or order, for examination under the former practice. (See *R. S. O. c. 49*, ss. 18, 19; *Ib. c. 50*, s. 305; *Rule 369.*) The debtor may also be subpœnaed according to the former practice in Chancery for procuring the attendance of parties to be examined for the purposes of discovery, and may be required to produce books and papers, in the same way as a witness. (*Rule 368.*) The safer practice would seem to be to issue a *subpœna*, and serve it, with a copy of the appointment, on the debtor, forty-eight hours before the time appointed for the examination, and pay him the same fees as would be payable to an ordinary witness. The words "two preceding rules," in *Rule 369*, seem intended to refer, not to the two rules immediately preceding, but to *Rules 366, 367*, but when the liberty of the subject is in question, effect might be given to the technical difficulty created by the wording of *Rule 369*, as it at present stands.

It would also seem desirable, that either in the appointment or *subpœna*, the nature of the proposed examination should be briefly stated.

Consequence of non-attendance, or unsatisfactory answers, &c.—If the debtor do not attend, and has no sufficient excuse for not attending; or refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same; or if it appears by his examination that he has concealed or made away with his property, in order to defeat, or defraud, his creditors or any of them, an application, on notice to the debtor, (*Ponton v. Bullen*, 2 E. & A. 379,) may be made to commit him to gaol for any time not exceeding twelve months under a writ of *capias ad satisfaciendum*. (See R. S. O. c. 50, s. 305). The application may be made at the time of the examination, and without a summons, or notice to show cause, if the officer before whom the examination is taken, is entitled to entertain it, *e. g.*, in County Court cases where the examination is had before the Judge. (*Ponton v. Bullen*, *supra*; *Baird v. Story*, 23 U. C. Q. B. 624). If the debtor do not attend, or refuses to disclose the matters, in respect of which he may be examined, he may also be proceeded against for contempt, as in the case of a witness. (*Rules* 368.)

Answers are not unsatisfactory, within the meaning of the Act, because they do not account for the application of the debtor's assets in a proper manner. (*Hobbs v. Scott*, 23 U. C. Q. B. 679; *Lemon v. Lemon*, 6 Pr. R. 184; *Boswell v. Pomeroy*, 2 Pr. R. 310.)

An order to commit must be absolute in its terms. An order to commit, unless the debtor forthwith gives a note, is bad. (*Chichester v. Gordon*, 25 U. C. Q. B. 527). But when in a County Court case, the Judge before whom the examination was taken, informed the debtor at its close, that his answers were unsatisfactory, and that unless he assigned to the plaintiff certain property mentioned, he would order his committal if the plaintiff's attorney applied for it. The order for it, subsequently granted without further notice, was held valid. (*Baird v. Story*, 23 U. C. Q. B. 624). A married woman debtor is liable to commitment. (*Metropolitan L. & S. Co. v. Mara*, 8 Pr. R. 355). The

debtor is bound to give all necessary particulars to enable the judgment creditor to recover under a garnishee order. (*Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8; 44 L. T. 399.)

Costs of Examination.—Formerly the debtor could not at law be ordered to pay the costs of the examination, except as a term imposed on a motion to commit. (*Ginty v. Rich*, 7 Pr. R. 319; see, however, *Evans v. Evans*, 1 Chy. Ch. Pr. 303). Now the costs are in the discretion of the Court, or a Judge. (*Rule 378*.)

3. ATTACHMENT OF DEBTS.

Attachment of Debts.—The application to attach debts due to a judgment debtor, may be made in Chambers, as formerly, either before, or after, the examination of the debtor. The affidavit in support of the application may, however, now be made by the judgment creditor, or his solicitor, or some other person or persons aware of the facts. (*Rule 370*.) Formerly it could only be made by the creditor or his solicitor. (*Builder v. Kerr*, 7 Pr. R. 323.) For form of Order, see *Form No. 134*.

(a) Debts Attachable.

What Debts may be attached.—As a general rule, debts due to the debtor, in which he is beneficially interested, and for which he can sue, can be attached.

A present debt, payable at a future time, may be attached. (*Tapp v. Jones*, 44 L. J. Q. B. 12; 10 L. R. Q. B. 54); but a salary payable quarterly, but not due until a future date, is not such a debt. (*Hall v. Pritchett*, 47 L. J. Q. B. 15; 3 Q. B. D. 215.)

Money found by the garnishee which belongs to the debtor:—

Rent due. (*Mitchell v. Lee*, 2 L. R. Q. B. 259); but rent to accrue due at a future time is not attachable. (*Commercial Bank v. Jarvis*, 5 U. C. L. J. 66.)

Money in a sheriff's hands. (*Murray v. Simpson*, 8 Ir. C. L. R. App. 45); or in a Division Court bailiff's hands. (*Lockhart v. Gray*, 2 C. L. J. N. S. 163).

Debt due to a defendant as executor, may be attached to answer a debt due by him in the same character. (*Burton v. Roberts*, 6 H. & N. 93).

Money in the hands of a receiver. (*Re Cowan*, 14 Ch. D. 638.)

Surplus money in the hands of a mortgagee, arising from sale of mortgaged premises. (*McKay v. Mitchell*, 6 U. C. L. J. 61; *Nicol v. Ewen*, 7 Pr. R. 331). but see *Chatterton v. Watney* 44, L. T. 391, where it was held by the Court of Appeal that such moneys were not attachable, but could only be reached by way of equitable execution.

Equitable debts. (*Wilson v. Dundas*, W. N. 1875, 232; *Summers v. Morpew*, 61 L. T. (J.) 140; *Re Cowan*, 14 Ch. D. 638.)

Debts owing to one of two debtors. (*Miller v. Mynn*, 1 E. & E. 1075); but not a debt due to a debtor and a third party. (*Re Smart & Miller*, 3 Pr. R. 85); but a parol agreement by the debtor to let a stranger participate in the profits of a contract, will not bar the right to attach the debt due under such contract. (*Bescoby v. Hamilton Water Commissioners*, 9 U. C. C. P. 81.)

Dividends on bank stocks. (*Solomon v. Donovan*, 10 Ir. C. L. R. App. xiii.)

Funds in the hands of an official manager of a company being wound up. (*Ex p. Turner*, 3 L. T. N. S. 389.)

Negotiable bills not yet due. (*Mellish v. Buffalo B. & G. R. W. Co.*, 2 Pr. R. 171.)

Debt of an unascertained amount. (*Daniel v. McCarthy*, 7 Ir. C. L. R. 261.)

Moneys in the hands of bankers. (*In re U. E. & I. Ins. Co., ex p. Hawkins*, 5 L. R. Eq. 300; S. C. 3 L. R. Chy. 787.)

A debt which is attachable does not cease to be so because the debtor has brought an action to recover it; neither does the giving of a cheque by the garnishee to the debtor prevent the attachment of the debt, if otherwise attachable, if the cheque has not been paid, and its payment has been stopped. (*Cohen v. Hall*, 3 Q. B. D. 371.)

(b) *Debts not Attachable.*

What Debts are not Attachable.—As a general rule a debt, or money, for which the debtor cannot sue, cannot be attached.

Among others, the following claims have been held not to be attachable, *e. g.*, claims for:—

Unliquidated damages until judgment, by which alone they become a debt. (*Johnson v. Diamond*, 24 L. J. Ex. 217; *Bank of Toronto v. Burton*, 4 Pr. R. 56), they are not attachable, even after verdict, before judgment. (*Jones v. Thompson*, 27 L. J. Q. B. 234; *Dresser v. Johns*, 28 L. J. C. P. 281; *Roberts v. City of Toronto*, 16 Ch. 236; *Boyd v. Haynes*, 5 Pr. R. 15); nor after an award before judgment (*Gwynne v. Rees* 2 Pr. R. 282.)

Unascertained balance due from one partner to another. (*Campbell v. Peden*, 3 U. C. L. J. 68.)

Legacy in the hands of an executor, unless there has been such an account stated by the executor as would entitle the debtor to sue. (*McDowell v. Hollister*, 25 L. J. Ex. 185.)

Wages under \$25. (See *R. S. O. c. 50, s. 318.*)

Salary payable quarterly, but not due until a future date. (*Hull v. Pritchett*, 47 L. J. Q. B. 15; 3 Q. B. D. 215.)

Rent to accrue due at a future time. (*Commercial Bank v. Jarvis*, 5 U. C. L. J. 66.)

Claims to equitable relief founded on torts. (*Roberts v. The City of Toronto*, 16 Chy. 236, and see *Blake v. Jarvis*, 16 Chy. 295; 17 Chy. 201; *Wilson v. Dundas*, W. N. 1875, 232.)

Debts which have been assigned in good faith. (*Hirsch v. Coates*, 18 C. B. 757; *Wise v. Birkenshaw*, 29 L. J. Ex. 240); even though the garnishee had no notice of the assignment. (*Pickering v. Ilfacombe R. W. Co.* 3 L. R. C. P. 235; *Grant v. McDonell*, 39 U. C. Q. B. 412; but see *Bescoby v. Hamilton Water Commissioners*, 9 U. C. C. P. 81.)

Debts due to a debtor as executor, or administrator, cannot be attached to answer a debt due by him individually. (*Bowman v. Bowman*, 1 Chy. Ch. R. 172; *Macauley v. Rumball*, 19 U. C. C. P. 284.)

Debts owing to a judgment debtor jointly with a third party. (*Re Smart & Miller*, 3. Pr. R. 385.)

Bond of indemnity against improper conduct of third person, not even though breach proved. (*Griswold v. Buffalo B. & G. R. W. Co.* 2 Pr. R. 178; 3 U. C. L. J. 115.)

(g) *Effect of Attaching Order.*

Effect of Attaching Order.—Service of the attaching order, or of notice thereof, as the Court, or a Judge, shall direct, upon the garnishee, binds the debt in his hands. (*Rule 371.*) No subsequent assignment by the debtor, can affect the right of the attaching creditor, the order attaching a debt overrides the general lien of the attorney of the debtor, but not his particular lien. (*Cotton v. Vansittart*, 6 Pr. R. 96; *Burchell v. Pugin*, 32 L. T. 495.) The *bond fide* payment of the debt by the garnishee to the judgment debtor before service of an attaching order, will protect the garnishee. (*Cooper v. Brayne*, 27 L. J. Ex. 446, 31 L. T. 265.)

(d) Application to pay over.

Application to pay over.—Debts accruing, may be ordered to be paid when they fall due, and it is not necessary to wait and obtain a fresh order for each instalment as it becomes payable, (*Tapp v. Jones*, 10 L. R. Q. B. 591,) but the garnishee cannot be ordered to pay before the period of credit, if any, has expired. (*Harding v. Barratt*, 3 U. C. L. J. 31.)

If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due, or claimed to be due, from him to the debtor, or if he does not appear upon summons, then the Court, or a Judge, may order execution to issue against him, to levy the amount due. (*Rule 372*.)

If, however, he disputes his liability, then the Court, or Judge may determine the question, (*Wise v. Birkenshaw*, 2 L. T. N. S. 223,) or order any question necessary for defining his liability, to be tried in any way in which any issue or question in an action may be tried, (*Rule 373*.) *e. g.*, by reference to an *Official Referee*, or by trial before a Judge in the ordinary way, &c.

Where the garnishee has notice of an assignment of the debt, he should bring the fact to the attention of the Court, or he may have to pay the debt twice over.

If it is suggested that any third party is entitled as assignee, or has any lien, the Court, or Judge, may order such third person to appear (*Rule 374*), and in case he does not appear when ordered, or if appearing, then after hearing him, execution may be ordered against the garnishee, or if necessary the trial of any issue or question, as above mentioned, may be directed, or the claim of the third party may be barred, or such other order made as shall be proper, both as to costs and otherwise. (*Rule 375*.) The judgment debtor should have notice of the

application to pay over. (*Ferguson v. Carman*, 26 U. C. Q. B. 26.) For form of order to pay over see *Form No. 135*.

(e) *Payment by Garnishee.*

Payment by Garnishee.—A garnishee should not pay over without an order to pay, or he may have to pay the debt twice, (*Clark v. Clark*, 8 U. C. L. J. 107.) But payment in pursuance of an order, or under execution issued thereon, is a discharge of the garnishee as against the debtor, although such proceedings may afterwards be set aside, or the judgment reversed. (*Rule 376*.) But the existence of the order to pay over, is of itself no bar to an action by the debtor. (*Sykes v. Brockville and Ottawa R. W. Co.*, 22 Q. B. 459.) It would seem to be intended that a garnishee may now, if he please, pay the money into Court (*Rule 372*), but an order is necessary to entitle him to do this. The effect of the bankruptcy of the judgment debtor before payment by the garnishee, is to entitle the assignee to have both the attaching order, and the order to pay over, if it has not been acted on, discharged, (*Tilbury v. Brown*, 30 L. J. Q. B. 46;) but if the garnishee is compelled to pay under threat of execution, after notice of the bankruptcy, he is discharged as against the assignee. (*Wood v. Dunn*, 2 L. R. Q. B. 73.) He is bound to set up the bankruptcy, if he have notice of it before the order to pay over is made. (*Ib.*)

CHAPTER XIV.

EVIDENCE.

1. *Evidence at the trial, or on motion for judgment.*
 - (a) *Evidence at the trial.*
 - (b) *Evidence of particular witnesses may, by leave, be taken before an Examiner.*
 - (c) *Evidence by affidavit, where admissible without consent or leave, on motion for judgment.*
 - (d) *Evidence may be given by affidavit at the trial, or on motion for judgment, by consent.*
 - (e) *Evidence of witnesses out of the jurisdiction, how obtained.*
 - (f) *Admissions.*
 - (g) *Production of Documents.*
2. *Evidence on Motions.*
3. *Affidavits.*

1. EVIDENCE AT THE TRIAL, OR ON MOTION FOR JUDGMENT.

(a) *Evidence at the Trial.*

At the trial of an action, witnesses to be examined vivâ voce.—In the absence of any agreement between the parties, and subject to the *Rules*, the witnesses at the trial of an action, or at an assessment of damages, are to be examined *vivâ voce*, and in open Court. (*Rule 282.*) For forms of *subpœna*, see *Forms Nos. 99-102.*

Evidence of particular facts, or of particular witnesses, may by leave, be given by affidavit.—The Court, or a Judge, may, at any time, for sufficient reason, order that any particular fact, or facts, may be proved by affidavit,

or that the affidavit of any particular witness may be read at the hearing, or trial, on such conditions as the Court, or Judge, may think reasonable. Except where it appears to the Court, or Judge, that the other party, in good faith, desires the production, for cross-examination of a witness who can be produced, in which case no order is to be made authorizing the evidence of such witness to be given by affidavit. (*Rule 282.*)

(b.) Evidence of a particular witness may, by leave, be taken before an Examiner.

Any witness whose attendance ought to be dispensed with may, by order of the Court or a Judge, be examined before an examiner, (*Rules 283, 285*) and the Court, or Judge, may allow his deposition to be given in evidence at the hearing of the cause. . (*Rule 285.*)

(c.) Evidence by Affidavit, where admissible, without consent or leave, on motion for Judgment.

On motion for judgment, where any of the parties are infants, and the facts are not disputed, the allegations in the statement of claim, and the documentary evidence required to be adduced to establish the plaintiff's case, may, without leave or consent, be proved by affidavit, in accordance with the former practice in Chancery on motion for decree. So also in cases where the only evidence is documentary, and such evidence as is necessary to prove the execution or identity of the documents, and no cross-examination of the deponents is required, the evidence may be given by affidavit. (*See Rule 322.*)

(d.) Evidence may be given by Affidavit at the Trial, or on Motion for Judgment, by consent.

Consent to Affidavit Evidence.—The parties to the cause may, by consent in writing (*New Westminster Brewery Co. v. Hannah*, 1 Chy. D. 278,) agree that the evidence in the cause shall be given by affidavit. (*Rule 301.*) The guardian

ad litem of an infant, may give such consent. (*Knatchbull v. Fowler*, 1 Ch. D. 604.) But unless the consent specifies that the evidence is to be given by affidavit only, a witness who has made an affidavit may also give evidence, *viva voce*, at the trial. (*Glussop v. Heston Local Board*, W. N. 1878, 72.) When any party who has agreed to the evidence in the case being taken by affidavit, afterwards finds he cannot procure his witnesses to make affidavits, he may apply in Chambers to be relieved from the undertaking. (*Warner v. Mosses*, 16 Ch. D. 100.)

When Plaintiff's Affidavits to be filed.—The plaintiff's affidavits are to be filed, and a list thereof delivered to the defendant within fourteen days from the giving of the consent. (*Rule 301.*)

When Defendant's Affidavits to be filed.—The defendant's affidavits are to be filed, and a list thereof delivered to the plaintiff, within fourteen days after the delivery of the plaintiff's list. (*Rule 302.*)

When Affidavits in reply to be filed.—The affidavits in reply must be filed, and a list thereof delivered to the plaintiff, within seven days after the expiration of the time for filing affidavits in answer. Affidavits in reply are to be confined to matters strictly in reply. (*Rule 303.* See, however, *Peacock v. Harper*, 7 Ch. D. 648, where confirmatory affidavits were received in reply.)

Time for filing Affidavits, may be extended.—The time for filing any affidavits in chief, in answer, or in reply, may be extended by consent of parties, or by order of the Court, or a Judge, (*Rules 301-303, 462.*)

Cross-examination.—When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed by the opposite party, may give notice in writing within fourteen days after the time for filing affidavits in reply, requiring such deponent to be produced at the trial for cross-examination, and

unless the deponent is produced accordingly, his affidavit cannot be used except by leave of the Court. The party requiring the witness to be produced is not in the first instance bound to pay the expenses of his production; (Rule 304) but the party filing the affidavit must *subpœna* the deponent as a witness in the ordinary way. (Rule 305.)

Trial of Action in which Evidence is given by Affidavit.

—Where all the evidence in an action is to be given by affidavit, and no cross-examination of any deponent is required, it would seem that the cause need not be carried to trial in the ordinary way, as in causes where *vivâ voce* evidence is to be given, but may be set down to be heard before the Court at Toronto, on motion for judgment. (Rule 306.) The notice of motion for judgment is to be given at the close of the evidence. (Rule 306.) But where a cross-examination of deponents is required, it seems clear that the evidence cannot be considered closed until the cross-examination has taken place. Notice of motion for judgment, therefore, cannot be given until the time for giving notice of cross-examination has expired, and only then where such notice has not been given. If notice of cross-examination be given, then it would seem necessary in the absence of any leave of the Court, or a Judge, to the contrary, that the action should be brought to trial in the ordinary way, where witnesses are to be examined *vivâ voce*.

(e) Evidence of witnesses out of the Jurisdiction, how obtained.

Commissions.—Evidence of witnesses out of the jurisdiction, may be taken under a commission. An order for the issue of a commission must be obtained on notice to the opposite party. Where evidence is required on a reference before a Master, a commission may be issued on the certificate of the Master. (*Chy. O. 221*), this certificate can only be granted ordinarily upon notice to the opposite party: (*McLennan v. Helps*, 3 Chy. Ch. R. 193.)

The *Rules* have made some slight changes in the former procedure, in reference to obtaining commissions, and have been framed so as to avoid attendances to strike commissioners' names; and have settled definitely how the evidence is to be taken, and the time for filing interrogatories and cross-interrogatories, &c.

Motion for Commissions.—The party applying for a commission is in his notice of motion, or summons, to state the name of the commissioners to whom he desires the commission to be issued, and where the opposite party desires to name a commissioner, he must, on the return of the motion, give notice to the applicant of the name of the commissioner. (*Rule 286.*) The Court or Judge may order the commission to issue to the person so named, or to any others. (*Rule 287.*) The opposite party must also on the return of the motion, state whether he wishes notice of the execution of the commission, and if so, he must give the name, and place of abode, of some person resident within two miles of the place where the commission is to be executed, on whom such notice may be served. (*Rule 291.*) As a general rule, the application cannot be made, until after issue has been joined. (*Allan v. Andrews*, 5 P. R. 32; *Royal Canadian Bank v. Cummer*, 2 Chy. Ch. R. 388.) An order for a commission is not granted as of course, and where the Court was of opinion that the proposed witness should, and could, be produced at the trial, the motion was refused. (*Price v. Bailey*, 6 Pr. R. 256.) And where there had been unreasonable delay on the part of the applicant, the motion was refused. (*Stewart v. Gladstone*, 37 L. T. 575.) So also where there was another action pending in the foreign country for the same cause, (*Mair v. Anderson*, 11 U. C. Q. B. 160,) and where the object was to obtain mere scientific testimony, (*Russel v. The Great Western R. W. Co.*, 3 U. C. L. J. 116,) the motion was refused.

What Order, or Certificate, for Commission, to contain.—Every order or certificate for a commission is to state,—(a) the names of the commissioners to whom the commission

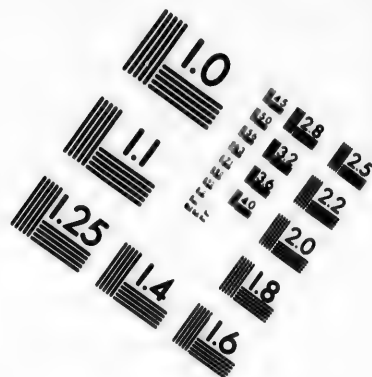
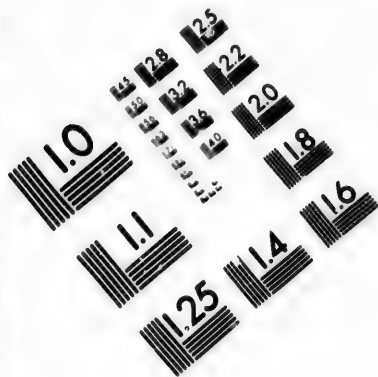
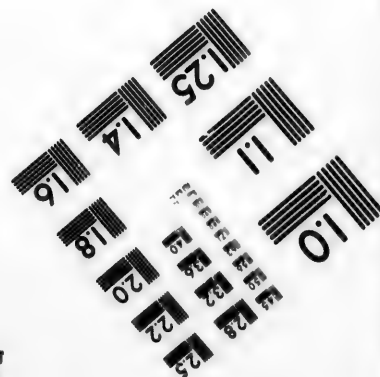
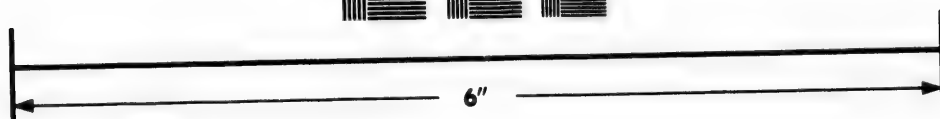
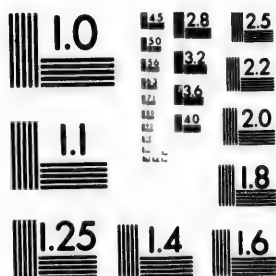


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is to be issued,—(b) whether the examination is to be taken upon oral questions, or written interrogatories,—(c) whether notice of the execution of the commission is to be given to the opposite party, and if so,—(d) the name and address of the person on whom such notice is to be served. (*Rule 288.*) *Rule 297* seems to contemplate that the order should also appoint a day for the return of the commission, but the form of order given in the *Rules* is silent on this point.

For form of order for commission see *Form No. 129*, and as to the effect of an order in that form see *Rule 300*. For form of commission see *Form No. 103*.

Commission, how far a Stay of Proceedings.—When a commission is issued, the trial of the action is *ipso facto* stayed until the return of the commission. (*Rule 299.*)

Examination of Witnesses under a Commission.—The examination of witnesses under a commission, is to be taken under oath, or affirmation, or otherwise, according to the witnesses' religion, (*Rule 294*), and is to be upon written interrogatories unless otherwise agreed. Oral questions upon the subject matter of, or arising out of answers to, the written interrogatories may be put, or the examination may, by consent, be altogether on oral questions, but all oral questions must be reduced to writing, and with the answers thereto, returned with the commission. (*Rule 289.*)

The examination may take place *ex parte* unless the opposite party, upon the application for the order, or Master's certificate requires notice, and gives the name and address of some person resident within two miles of the place where the commission is to be executed, on whom such notice may be served. (*Rule 291.*) If such address be illusory or fictitious, the commission may also be executed *ex parte*.

Interrogatories when to be delivered.—Interrogatories in chief are to be delivered at least eight days before the issue of the commission (unless otherwise ordered) and the

cross-interrogatories (unless otherwise ordered) are to be delivered within four days after the receipt of the interrogatories in chief, and in default the commission may be sent without the cross-interrogatories.

' The interrogatories and cross-interrogatories should be filed in the office from whence the commission issues. (*Darling v. Darling*, 8 Pr. R. 391.)

Notice of execution of Commission.—Where notice of execution of the commission is required, notice in writing stating the time and place of the intended examination is to be addressed to the person named in the order, or certificate, for the commission, and service thereof upon him or a grown up person at the address stated in the order, or certificate, is sufficient. If the party served with notice do not attend, or the address given be illusory or fictitious, the commission may be executed *ex parte*. (Rule 292.) Proof of the facts entitling the party to proceed *ex parte*, by affidavit, or otherwise, should be returned with the commission, or there may be a difficulty about using the evidence. Where the opposite party has joined in the commission, or named a commissioner, if either of the commissioners named, refuse to act in the execution of the commission, on receiving forty-eight hours' notice in writing from the other of them so to do, the commission may be executed by the commissioner giving the notice, alone. (Rule 298.)

Commissioners to be sworn.—Before proceeding with the execution of the commission, the commissioners must be sworn. For form of oath, see *Form No. 103*. The form of commission contemplates there being at least two commissioners named, each of whom is empowered to administer the oath to the other of them. Where only one commissioner is named, it would seem necessary to alter the wording of the commission, and direct that the oath be taken before some one or other empowered to administer oaths by *R. S. O. c. 62, s. 38*.

Depositions to be Signed.—The depositions are to be signed by the witness and the commissioner. (*Rule 296.*)

Interpreter and Clerks may be employed if necessary.—The commissioners may nominate an interpreter, and clerks, when necessary, who are to be duly sworn. (*Rule 295,* and see *Form No. 103.*)

Return of Commission.—The interrogatories, and cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof, are to be returned to the Judge, or officer, on or before the day which may be ordered, enclosed in a cover, under the seal or seals of the commissioners; and office copies thereof may be given in evidence at the trial, saving all just exceptions, without any proof of the absence of the witness, or witnesses, except the affidavit of the solicitor or agent of the party as to his belief of such absence (*Rule 297.*)

Costs of Commission.—The costs of a commission have to be borne, in the first instance, by the party issuing the commission, as part of his costs in the cause, except costs occasioned by the opposite party joining in the commission, *i.e.*, examining witnesses in his own behalf thereunder, or by his naming a commissioner, in which cases the opposite party must bear the expense thus occasioned as part of his costs in the cause, but without prejudice to the question by whom such costs are to be ultimately borne. (*Rule 298.*)

Evidence of Witnesses out of Jurisdiction, may also be taken under Order.—The evidence of witnesses residing out of the jurisdiction may also be taken under a simple order without any commission, and this will in practice be found convenient where the expense and delay occasioned by the delivery of interrogatories can be safely avoided. (See *Rule 285.*)

Letters Rogatory.—Where any witness, resident abroad, is unwilling to attend voluntarily for examination, resort may be had to Letters Rogatory, which are letters issued out of and under the seal of the Court, addressed to some Court of the foreign country where the witness resides, requesting such Court to procure the evidence to be taken. (See 31 *Vic. c. 76 D.*) For form of notice of motion for Letters Rogatory, (see *Leggo's Forms*, 2nd ed., No. 279,) and for form of Letters Rogatory, (see *Ib.* No. 287).

(f) *Admissions.*

Admissions.—Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit after such notice, the costs of proving any such document are to be borne in any event by the party refusing to admit, unless at the hearing, or trial, the Court certify that the refusal to admit was reasonable. No costs of proving any document are to be allowed unless notice to admit be first given, unless the admission to give notice, in the opinion of the taxing officer, was a saving of expense. (*Rule 241.*) For form of notice to admit, see *Form* No. 26.

How Proved.—Admissions in the pleadings sufficiently appear by the certified copy of pleadings required to be filed as a record. Other admissions may be proved, by the production of written admissions, purporting to be signed by the solicitor of the party on whose behalf the admissions purport to be made, which is sufficient *prima facie* evidence of such admissions. (*Rule 243.*)

(g) *Production of Documents.*

Production of Documents.—The production of documents in the possession of the opposite party may be obtained in the ways mentioned *post* chapter xix., and the production of documents in the possession of third persons may be obtained by serving a *subpoena duces tecum* according to the former practice at law and in equity.

II. EVIDENCE UPON MOTIONS.

Affidavits.—Upon any motion, petition, or summons, evidence may be given by affidavit. (*Rule 283.*)

Cross-examination on Affidavits.—Any person having made an affidavit to be used, or which shall be used, on any motion, petition, or other proceeding, is bound, on being served with a *subpœna ad test*, to attend for cross-examination, but the Court may, nevertheless, act upon the evidence before it at the time, and make such interim order, or otherwise, as may appear necessary to meet the justice of the case. (*Rule 283.*) The right to cross-examine, under *Rule 283*, does not appear to be intended to apply to affidavits, filed by consent, as evidence at the hearing, or trial, of a cause. The cross-examination of the deponents making such affidavits, is obtained by serving notice to produce them at the trial, as already pointed out, *ante* p. 163. (See *Rule 304*), and see further, as to evidence upon motions in Court, and in Chambers, *post* chapter xiv.

III. AFFIDAVITS.

Affidavits, how to be framed.—Affidavits are to be confined to such facts as the witness is able, of his own knowledge, to prove, except on interlocutory motions, when statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of, or extracts from, documents, are to be paid by the party filing the same. (*Rule 284.*)

Form of Affidavits.—Every affidavit is to be drawn up in the first person, and divided into paragraphs, and every paragraph must be numbered consecutively, and, as nearly as may be, is to be confined to a distinct portion of the subject. No costs are to be allowed for any affidavit, or part of an affidavit, substantially departing from this rule. (*Rule 464.*) Every affidavit is to be written, or printed, (*Ib.*), or partly written and partly printed. (*Rule 453.*)

Description, and Signature, of Deponent necessary.—Every affidavit is to state the description, and true place of abode, of the deponent, and is to be signed by him. (Rule 465.)

Affidavits made by two or more Deponents.—In affidavits made by two or more deponents the names of the several persons making the affidavit are to be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time, by the same officer, it shall be sufficient to state that it was sworn by both, or all, of the "above-named" deponents. (Rule 466.)

Notice showing by whom filed.—There is to be appended to, or indorsed upon, every affidavit a note showing on whose behalf it is filed. (Rule 467.)

Interlineations, &c., to be authenticated.—Affidavits having, in the jurat, or body thereof, any interlineation, alteration, or erasure, cannot, without the leave of the Court, or a Judge, be read or made use of in any matter pending in Court, unless the interlineation, or alteration, other than by erasure, is authenticated by the initials of the officer taking the affidavit; nor in the case of an erasure, unless the words, or figures, appearing at the time of taking the affidavit to be written on the erasure are rewritten, and signed, or initialed, in the margin of the affidavit, by the officer taking it. (Rule 468.)

Affidavits by Illiterate Persons.—Where the deponent in an affidavit appears to the officer taking the affidavit to be illiterate, the officer is to certify in the jurat that the affidavit was read, in his presence, to the deponent; that the deponent seemed perfectly to understand it, and that the deponent made his, or her signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court, or a Judge, is otherwise satisfied that the affidavit was read over to, and apparently perfectly understood by, the deponent. (Rule 469.)

Affidavits to be Stamped when used.—In cases in which, by the present practice, an original affidavit is allowed to be used, it shall, before it is used, be stamped with a proper filing stamp, and shall, at the time when it is used, be delivered to, and left with, the proper officer in Court, or in Chambers. (*Rule 470.*)

Office Copies of Affidavits may be used.—An office copy of an affidavit may, in all cases, be used, the original affidavit having been previously filed in the proper office, and the copy duly authenticated with the seal of that office. (*Ib.*)

Before whom Affidavits to be Sworn.—Every person entitled to administer oaths in the former Courts of Queen's Bench, Common Pleas, and Chancery, is entitled to administer oaths in actions and matters pending in the High Court of Justice. (*J. A., s. 73.*)

CHAPTER XV.

COSTS.

1. *Principles on which costs awarded.*
2. *Taxation of costs.*
3. *Set-off of costs.*
4. *Revision, and review, of taxation.*
 - (a) *Revision of taxation.*
 - (b) *Review of taxation.*
5. *Taxation between solicitor and client.*
6. *Tariff of costs.*
 - (a) *Disbursements.*
 - (b) *Fees payable to solicitors.*

1. PRINCIPLES ON WHICH COSTS AWARDED.

An important change is made in the law of costs, by the *Rules*. Formerly in actions at law, the costs of the litigation followed the event, except in certain cases where there was some statutory provision to the contrary. There were many statutes regulating the question of costs at law, in particular actions, but the effect of the *Rules* is to repeal them all. (*Garnett v. Bradley*, 3 App. Cas. 944; *Bowey v. Bell*, 36 L. T. 550).

In suits in Chancery the costs were usually in the discretion of the Court, but the rule usually followed was, in the absence of any special circumstances, to award the costs to the successful party in the suit; mortgagees, trustees, and others, standing in a fiduciary character, were usually awarded their costs in any event, and such costs were generally charged on the mortgaged estate, or trust fund in question in the suit.

Under the *Rules*, the costs of, and incidental to, all proceedings in the High Court, are in the discretion of the Court. (*Rule 428*.) But this discretion over the costs does not extend to depriving a trustee, mortgagee, or other person, of any right to costs out of a particular estate, or fund, to which he would be entitled, according to the rules hitherto acted upon in Courts of Equity. (*Ib.*) Where a cause is tried by a jury, the costs of the action are, in all cases, to follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom the action is tried, or the Court, shall otherwise order. (*Ib.*) Thus, where a nonsuit, or a verdict for a defendant is set aside and a new trial ordered, which results in the plaintiff's favour, the plaintiff is entitled to his costs, of both trials, unless otherwise ordered. (*Green v. Wright*, 2 C. P. D. 354, 36 L. T. 355; *Field v. Great Northern R. W. Co.*, 3 Ex. D. 261.)

The application to deprive a successful party of costs in an action tried by a jury, must be made to the judge at the trial, either before, or immediately after, the rendering of the verdict. (See *Collins v. Welsh*, 5 C. P. D. 33; *Major v. McKenzie*, 23 U. C. C. P. 261; *Falls v. Lewis*, Dra. 500; *McKee v. Irwine*, 1 U. C. Q. B. 160; *Handcock v. Bethune*, 2 U. C. Q. B. 386; *Malloch v. Johnston*, 4 U. C. Q. B. 352; *Hamilton v. Clarke*, 2 Pr. R. 189; *Bonter v. Pretty*, 9 U. C. C. P. 273); but where the application is made at the trial, the Judge may take time to consider, and give his decision on the application at a subsequent time. (*Wise v. Hewson*, 1 Pr. R. 232.) Where the application is not made to the Judge at the trial, he has no power afterwards to make an order, nor can a Judge in Chambers. (*Baker v. Oates*, 2 Q. B. D. 171; *Tyne Alkali Co. v. Lawson*, 36 L. T. 100.)

But where no application has been made to the Judge at the trial, an application may be subsequently made to a Divisional Court to deprive a successful party of costs of an action tried by a jury, (*Myers v. Defries*, and *Siddons*

v. Lawrence, 4 Ex. D. 176); but if the Judge at the trial make an order, no appeal lies to a Divisional Court from his decision. (*Marsden v. Lancashire and Y. R. W. Co.*, 44 L. T. 239.)

The Judge may, at the trial, without any application, order that the costs shall not follow the event. (*Turner v. Heyland*, 4 C. P. D. 432; *Collins v. Welsh*, 5 C. P. D. 27; *Marsden v. Lancashire & Y. R. W. Co.*, 44 L. T. 239.)

The discretion of the Court in awarding costs in particular cases, will no doubt be guided as far as possible by certain fixed principles. The cases which have thus far been decided in England, appear to establish, that where there are some issues in which the plaintiff succeeds, and others in which a defendant succeeds, each party is entitled to the costs of the issues in which he is successful, and the plaintiff, in that event, is entitled to the general costs of the cause. (*Myers v. Defries*, 4 Ex. D. 176; *Barnes v. Bromley*, L. T. 7th May, 1881, 7; *Sparrow v. Hill*, L. T. May 6th, 1881, p. 6.) But where a plaintiff's claim is extinguished by a set-off, and counter-claim, and a balance is found in favour of the defendant, the latter is entitled to the costs of the action. (*Chatfield v. Sedgwick*, 4 C. P. D. 459; but see *Cole v. Firth*, 4 Ex. D. 301.)

Where the plaintiff fails on his claim, and the defendant on his counter-claim, the defendant is entitled to the general costs of the action, and the plaintiff to the increased costs occasioned by the counter-claim. (*Saner v. Bilton*, 11 Ch. D. 416; *Mason v. Brentini*, 15 Ch. D. 287.) Where an administration suit was occasioned by the executors, they were ordered to pay the costs of it. (*Re Radclyffe, Pearse v. Radclyffe*, 44 L. T. 96.)

Under the former practice in Chancery the Court, in the exercise of its discretion, frequently refused costs to a successful litigant, *e. g.*, when a plaintiff made charges of fraud, or improper conduct, which were not sustained in

evidence, he was not only denied costs, but sometimes ordered to pay the defendant's costs, (*Neale v. Winter*, 9 Chy, 261,) or the costs occasioned by the improper charges. (*Hodgins v. McNeil*, *ib.* 305.)

Where a successful defendant, by his answer, had improperly impugned the motives of the plaintiff's solicitor, the costs of the answer were disallowed. (*McKenzie v. Yielding*, 11 Chy. 406.)

Where a defendant's answer was untruthful, although the bill was dismissed, the defendant was refused his costs. (*Finlayson v. Mullard*, 10 Chy. 130.)

And even in a mortgage suit, where the Court was of opinion that the bill had been unnecessarily and improperly filed, the plaintiff was refused his costs. (*McLean v. Cross*, 3 Chy. Ch. R. 432.)

Where the bill was filed unnecessarily, costs were sometimes refused, (*Darling v. Wilson*, 16 Chy. 255), even though no objection was taken by the parties, (*Springer v. Clarke*, 15 Chy. 664,) and when a party adopted a more expensive proceeding when his object might as well have been attained by a less expensive one, the extra costs were refused, thus, where a defendant answered when he might have properly demurred, although at the hearing the bill was dismissed, the defendant was only allowed costs, as if he had demurred. (*Brouse v. Uram*, 14 Chy. 677.)

So also where a party moved in Court, where he might have moved in Chambers, the costs of the motion though successful were either refused altogether, (*Murney v. Courtney*, 10 Chy. 52,) or allowed only as of a motion in Chambers. (*King v. Connor*, 10 Chy. 364.)

2. TAXATION OF COSTS.

By whom Costs to be Taxed.—In Toronto costs in all the Divisions of the High Court, and also in the Court of

Appeal, are to be taxed by one or other of the *Taxing Officers* of the Supreme Court. These officers have each, for the purpose of any proceedings before them, power to administer oaths, examine witnesses, direct production of books, &c., make separate certificates, or allocators, require any party to be represented by a separate solicitor, and have generally all other powers exercised by any of the *Taxing Officers* of any of the Courts whose jurisdiction is vested in the High Court, or the Court of Appeal. (*Rule 438.*)

In actions in the outer counties, the costs will sometimes be taxable by the *Local Master*, and sometimes by the officer with whom judgment is entered.

In actions referred to any *Local Master* he will have power to tax the costs according to the former practice in Chancery. But where there is no such reference, and judgment is to be entered in any action in an outer county, the *Deputy Clerk of the Crown*, *Deputy Registrar*, or *Local Registrar*, in whose office the action is commenced, will tax the costs in the same manner as costs were formerly taxed in similar cases by the Deputy Clerks of the Crown. (*Rules 439, 417.*)

Attendance on Taxation.—The party liable to pay costs is usually entitled to notice of, and to attend, the taxation of the costs, if he has appeared in the action. But when the costs are payable out of a fund, or an estate, the taxing officer has power to arrange, and direct, what parties are to attend before him, on the taxation of costs to be borne by the fund, or estate, and to disallow the costs of any person whose attendance he may think unnecessary, in consequence of the interest of such party in such fund being small, or remote, or sufficiently protected by other parties interested. (*Rule 440.*)

Application of former Rules, Orders, and Practice.—The rules, orders, and practice of any Court, whose jurisdiction is vested in the High Court of Justice, or Court of Appeal,

relating to costs, and to the allowance of the fees of solicitors, and attorneys, and to the taxation of costs, existing prior to the commencement of the Act, are, in so far as they are not inconsistent with the Act and *Rules* of Court in pursuance thereof, to remain in force and be applicable to costs of the same or analagous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice, and Court of Appeal. (*Rule 445.*)

Costs of Unnecessary Proceedings not to be allowed.—Extra costs of using longer forms of writs, than those prescribed, are not to be allowed, unless otherwise ordered. (*Rule 6.*)

When any party appears upon any application, or proceeding in Court, or in Chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance, unless the Court, or Judge, expressly directs such costs to be allowed. (*Rule 437.*)

In order to secure the disallowance of costs of unnecessary attendances of merely formal parties, upon petitions, the sum of \$5 may be tendered with the petition, to cover any such respondent's costs of perusing it, accompanied by a notice that in case of his appearance in Court, his costs will be objected to. And where a petition in any cause, or matter, is served, and such notice is given to the party served, accompanied by a tender of \$5 for costs, the party making the payment is to be allowed the same in his costs, provided such service was proper, but not otherwise; but where no such tender is made, the right to costs, or to object to costs being allowed, is not prejudiced; and even though the notice be given and the \$5 tendered, the respondent may be allowed his costs if the Court, or Judge, shall think he was entitled to appear. (*Rule 434.*)

The Court or Judge may, at the hearing of any cause, or matter, or upon any application, or proceeding in any cause or matter, in Court, or in Chambers, and whether the same

is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed; or may direct the taxing officer to look into the same, and to disallow the costs thereof, or of such part thereof, as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length. In such case, the party whose costs are so disallowed is to pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before, and dealt with by, the Court, or Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any "decree or order") for the purpose aforesaid, and thereupon the same consequences are to ensue as if he had been specially directed to do so. (*Rule 435.*)

Where a plaintiff delivers a statement of claim, without being required to do so, the Court, or a Judge, may make such order as to the costs occasioned thereby, as shall seem just, if it appears that the statement of claim was unnecessarily, or improperly, delivered; and if no order be made by the Court, or a Judge, the taxing officer is to have the same duty. (*Rule 158 d, e.*) The propriety of making any examination for the purpose of discovery, may also be enquired into by the taxing officer, either with or without the direction of a Judge, and if it appears to have been had unreasonably, vexatiously, or at unnecessary length, the costs occasioned by the examination are to be borne wholly, or in part, by the party in fault. (*Rule 220.*) The costs of obtaining an order for production, and of any inspection of documents, or notice therefor, are not to be allowed unless it is shewn, to the satisfaction of the taxing officer that there were good and sufficient reasons for taking such order, giving the notice, or making the inspection. (*Rule 230.*) Where costs are to be borne by another party, no

costs are to be allowed, which do not appear to the taxing officer to have been necessary, or proper, for the attainment of justice, or defending the rights of the party; or which appear to the taxing officer, to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party. (*Rule 442.*)

Costs of application to extend Time.—Costs of applications to extend the time for taking any proceeding are, in the absence of any order directing by whom they are to be paid, in the discretion of the taxing officer. (*Rule 463.*)

Costs of copies of documents in possession of another party.—Where copies of documents in possession of another party, or extracts therefrom are taken under the *Rules*, or any special order, the party entitled to take the copy or extract, is to pay the solicitor of the party producing the document at the rate of 10 cents per folio, for such copy or extract as he may, by writing, require; and if the solicitor of the party producing the document refuses, or neglects, to supply the copy or extract, the solicitor requiring it, is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof. (*Rule 433.*)

Proceeding where party entitled to costs, refuses to bring in his bill.—Where any party entitled to costs, refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party the taxing officer may certify the costs of the other parties, and certify the refusal or neglect; or may allow the party refusing, or neglecting, a nominal, or other sum, for such costs, so as to prevent any other party being prejudiced by the refusal, or neglect. (*Rule 441.*)

3. SET-OFF OF COSTS.

Set-off of Costs.—In any case in which costs of unnecessary proceedings are disallowed, and the costs occasioned

thereby are allowed to the opposite party, and in any other case where a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs, such party is so liable to pay, and may adjust the same by way of deduction or set-off; or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive, until he has paid, or tendered, the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered. (*Rule 436*, and see *Bank of Upper Canada v. Thomas*, 10 Chy. 356.) Any costs ordered to be paid by any party, may also be set-off against any sum found due and payable in the action to such party, by the party entitled to receive such costs, and his solicitor's lien cannot prevent such right of set-off. (*Pringle v. Glag*, 10 Chy. D. 676; *Cameron v. Campbell*, 12 U. C. Q. B. 159; *Brigham v. Smith*, 17 Chy. 512; but see *Webb v. McArthur*, 4 Chy. Ch. R. 63.)

4. REVISION, AND REVIEW, OF TAXATION.

In certain cases the taxation of costs by a local officer must be revised by one of the *Taxing Officers* in Toronto, whether the parties desire it or not: in other cases a revision by the *Taxing Officer* in Toronto is not necessary unless any party interested requires it. Any officer who taxes a bill, may also be called upon to review his taxation, by any party interested.

(a) *Revision of Taxation.*

Cases in which revision is compulsory.—Every bill of costs in a suit pending in the Court of Chancery at the commencement of the Act, and every bill of costs in any action brought in any Division of the High Court, for the administration of an estate, or for partition, or for foreclosure, redemption, or sale, of mortgaged premises; and every bill, in any other action where the amount is to be paid out of an estate, or out of a fund in Court; or

when the amount taxed affects the interest of an infant, is to be subject to revision according to the former practice in Chancery; *Chy. O.* 310-313, are in other respects made applicable thereto. (*Rule 439.*) In such cases the *Local Master* is forthwith, after taxing a bill, to transmit it by mail, prepaid, to the *Taxing Officer* at Toronto, and he is to allow in the bill the postage for transmission and return of the same; and also a fee of \$1 for revision, and a law stamp for that amount, with the postage for return, is to be paid by the party procuring the bill to be taxed, which are to be enclosed with the bill to the *Taxing Officer.* (*Chy. O.* 311.) The *Taxing Officer* is then to revise the bill as provided by *Chy. O.* 312; and he has power to strike out, or restore, items improperly allowed, or struck out. (*Keim v. Yeagley*, 9 C. L. J. 55.) In cases where a revision of taxation is necessary, no sum is to be inserted for costs in a report of any *Local Master* until the taxation has been revised; (*Chy. O.* 313,) but in case of urgency, a writ of execution may issue for debt or costs, or both, subject to a future revision. (*Ib.*)

Cases in which revision is optional.—In other cases any party interested may, as of right, have the taxation of a local officer revised without giving the two day's notice required by the *Common Law Procedure Act*, s. 353. Where the revision is required, the party requiring it, is to give notice thereof to the opposite party, and file a *præcipe* with the local officer, to transmit the bill to the *Taxing Officer* at Toronto, for revision, and is to pay the fees and postage, as in cases where the taxation is compulsory. (*Rule 439, b. c.*) Pending the revision, judgment may be entered, and execution issued, unless the Court, or Judge, otherwise orders. If execution be issued, and the costs are reduced on revision, notice of the reduction is to be forthwith given to the sheriff or other officer, and the amount to be levied, is to be reduced accordingly. (*Rule 439, d.*)

Under the *Common Law Procedure Act* (*R. S. O.* c. 50,

s. 353) the Court, or Judge, might, by rule or summons, call upon a Deputy Clerk of the Crown to show cause why he should not pay the costs of revision and of the application, if in the opinion of the Court, or Judge, on the affidavits, and on hearing the parties, such Deputy Clerk was guilty of gross negligence, or of wilfully taxing fees or disbursements larger, or other, than those sanctioned by the rules and practice of the Court, and this section is now applicable to all the Divisions of the High Court. (*Rule 439b*). *Rule 412*, however, provides that every application at Chambers, in Toronto, authorized by the *Rules* which is not *ex parte* is to be made on notice; it would therefore seem necessary, that the application against any such officer, should be made on notice, instead of by rule, or summons, to show cause; but inasmuch as the statute seems to indicate that the Court, or Judge, is to be satisfied that there is a *prima facie* ground for the application, before it is made, it will be necessary that the leave of a Judge to serve notice of such an application, should be first obtained, and such leave also seems necessary on the ground of the local officer not being a party to the action. (See *post* p. 201.)

(b) *Review of Taxation.*

Review of Taxation.—The officer taxing a bill, whether in Toronto, or elsewhere, may, in certain cases, be required to review his taxation as to any particular items, to be specified.

Review of Taxation, how obtained.—Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole, or any part, of any item, or items, may at any time before the certificate, or allocatur, is signed, deliver to the other party interested therein, and carry it before the taxing officer, an objection in writing to such allowance, or disallowance, specifying therein by a list, in a short and concise form, the item, or items, or part, or parts thereof, objected to, and may thereupon apply to the taxing officer

to review the taxation in respect of the same. (*Rule 447.*) Such list need only specify the items objected to, it need not state the reasons of objection. (*Simmons v. Storer*, 14 Ch. D. 154,) and where the objection is one of principle to the whole taxation, it is not necessary to specify the items. (*Sparrow v. Hill*, 44 L. T. 146.)

Review of Taxation by Taxing Officer.—Upon such application the taxing officer is to reconsider and review his taxation upon such objections, and he may, if he thinks fit, receive further evidence in respect thereof, and, if so required by either party, he is to state either in his certificate of taxation, or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. (*Rule 448.*)

Appeal to Judge.—Any party who may be dissatisfied with the certificate, or allocatur, of the taxing officer, as to any item which may have been objected to as above mentioned, may apply to a Judge at Chambers, for an order to review the taxation as to the same item, or part of an item; and the Judge may thereupon make such order as may seem just; but the certificate, or allocatur, of the taxing officer is final and conclusive, as to all matters which are not objected to in manner above mentioned. (*Rule 449.*)

Evidence on Appeal to Judge.—The application to the Judge, is to be heard and determined by him, upon the evidence which was before the taxing officer, and no further evidence is to be received, unless the Judge shall otherwise direct. (*Rule 450.*)

When objections are taken to the allowance of items in the discretion of the taxing officer, his discretion will not be interfered with, unless it be manifest that he has failed to exercise it in a reasonable manner. (*Hargrave v. Scott*, 4 C. P. D. 21; *Brown v. Sewell*, 16 Ch. D. 517).

The appeal must be brought before a Judge, this being one of the matters excluded from the jurisdiction of the Master in Chambers. (See *post* p. 210.)

5. TAXATION BETWEEN SOLICITOR AND CLIENT.

An order for the taxation of a solicitor's bill between solicitor and client, might, under the former practice in Chancery, be obtained in certain cases on *præcipe*.

In the Chancery Division, orders of this kind may still be so obtained, but in the other Divisions it seems doubtful, whether a motion in Chambers is not necessary in all cases when the application is made in Toronto. See, however, *Rule 444*, which enables *Deputy Clerks of the Crown* to issue orders of this kind on *præcipe*.

Order for Taxation, how obtained.—The order for taxation may be obtained by the client on *præcipe* at any time within a month from the delivery of the bill, and when no order has been obtained by the client, the solicitor may, at the expiration of the month, either obtain an order for taxation, or bring an action. But an order should not be taken on *præcipe*, but a special application should be made therefor, where the client disputes the retainer, (*Re Thurgood*, 19 Beav. 541,) or where the client applies to tax part only of the bill, or where the application is made by one of several parties jointly liable; or there is a special agreement as to costs, or to give the solicitor a lien, (*Taylor's Chy. O.*, 50-51), or where it is a matter of dispute whether there has not been an agreement as to costs. (*Re C. & L.*, 15 C. L. J. 139)

Where the client obtained an order on *præcipe*, and the solicitor disputed the retainer, the order was upheld, the client being unaware of the solicitor's contention when he obtained the order, and the Court being of opinion that there had been in fact an acceptance of the retainer by the solicitor, (*Re Cameron*, 3 Chy. Ch. R. 204), and where the solicitor had obtained the order,—on a motion to set it aside, leave was given to the client to dispute the retainer on the reference. (*Re Bacon*, 3 Chy. Ch. R. 79.)

But where the order is obtained on *præcipe*, when a

special application should have been made, even though right on the merits, it may be set aside. (*Taylor's Chy. O. 50*).

An order for the *delivery of a bill* may be obtained by the client on *præcipe* in the Chancery Division, but in the other Divisions it can only be obtained on motion in Chambers.

By whom Order on Præcipe may be Issued.—When the order is grantable on *præcipe*, it may be issued by the Registrar (*a*), Deputy Registrar, Local Registrar, or Deputy Clerk of the Crown. (*Rule 444*.) Formerly such orders were only issued in Chancery by the Clerk of Records and Writs.

Form of Order.—Where a solicitor's bill, delivered to a client or other person, is referred for taxation, the solicitor is to give credit for all sums of money received from, or on account of, the client, and he is to refund what may, on such taxation, appear to have been overpaid.

And the Master is to tax the costs of the reference and certify what shall be found due to, or from, either party, in respect of the bill and demand, and of the costs of the reference, to be paid according to the event of the taxation pursuant to the statute.

And the solicitor is not to commence, or prosecute, any action or suit touching the demand, pending the reference.

And upon payment by the client, or other person, of what (if anything) may appear to be due to the solicitor, the solicitor (if required) is to deliver to the client or other person, or as he may direct, all deeds, books, papers, and writings in the solicitor's possession, custody, or power, belonging to the client.

(*a*) The only Registrars at the time the *Act* and *Rules* were passed, were the Registrars of the Courts, of Appeal, and Chancery : the Clerks of the Crown and Pleas, by a subsequent order in Council were designated Registrars of Queen's Bench, and Common Pleas, Divisions. Whether they are entitled to issue such orders, seems doubtful.

The order for taxation is to be read as if it contained the above particulars, but is not to set them forth, but may contain any variations therefrom, and any other directions which the Court, or Judge, shall see fit to make. (*Rule 443*).

For form of order, see *Form No. 136*.

Similar directions were contained in orders for taxation in Chancery under the former practice, but the direction to account, was held only to apply to moneys received in respect of the business for which the bill was rendered, and did not require the solicitor to render a general account of all moneys received by him, unless by agreement between the solicitor and client, the moneys coming into the hands of the solicitor, were to be applicable to payment of the bill of costs. (*Jones v. James*, 1 Beav. 307; *Re Smith*, 4 Beav. 309, 9 Beav. 182; but see observations on these cases, *Cooper v. Ewart*, 2 Ph. 362.)

6. TARIFF OF COSTS.

(a) Disbursements.

The fees to be paid in stamps, or otherwise, in the several Divisions of the High Court are the fees formerly payable on similar proceedings in the Courts of Queen's Bench, and Common Pleas, and if there was no similar proceeding in those Courts the fees to be paid, are those formerly payable on similar proceedings in Chancery. (*Rule 432*.) In addition to the fees payable under the Common Law Tariff, certain fees are also payable under *R. S. O. c. 39*, p. 411.

No express provision is made in the Act or *Rules* in respect to fees payable to officers who are paid by fees, but it is presumed those officers who are paid by fees will be entitled to receive all fees, except those payable under a statute, in cash as formerly, although the amount of such fees will now be regulated by the former Common Law tariff where there was any similar proceeding at law, and in other cases by the former tariff in Chancery.

As a new tariff of disbursements will be probably framed shortly, it is not thought desirable to reprint the old Common Law and Chancery Tariffs here.

(b) *Fees payable to Solicitors.*

Tariff of Fees made by the Judges of the Supreme Court of Judicature for Ontario, the 10th day of September, A.D. 1881:—

From and after the twenty-second day of August, 1881, the TABLE OF COSTS following shall be that according to which all Costs in Civil Actions in the High Court of Justice for Ontario shall be allowed and taxed, and no other fees, costs or charges than therein set down shall be allowed in respect of the matters thereby provided for.

TABLE OF COSTS.

General Allowance for Plaintiffs, and Defendants, as well between Solicitor and Client, as between Party and Party, approved by the Judges of the Supreme Court of Judicature for Ontario, this tenth day of September, A.D. 1881.

TARIFF OF FEES.

	\$	c.
1 Instructions to sue in undefended cases	3	00
2 In defended cases	4	00
3 Instructions to defend	4	00

WRITS.

4 All Writs except Subpœnas and concurrent and renewed Writs	2	00
5 Concurrent Writ	1	50
6 Renewed Writ	1	50
If over four folios, for every additional folio	0	20
7 Subpœna ad testificandum	1	00
8 Subpœna duces tecum	1	25
If over four folios, additional per folio	0	15
9 Notice of Writ for service in lieu of Writ out of jurisdiction, and copy	1	00
10 (Alias and subsequent Writs to be allowed as originals.)		
11 Special Indorsement of Writ of Summons	1	00
12 NOTE.—Above allowances to include all charges for attending for, and delivering to the Officer, and for all notices required to be indorsed on Writ, except as above provided for.		

COPY AND SERVICE OF WRITS OF SUMMONS, AND OTHER PROCESS.

13 For copy, including copy of notices required to be indorsed, each	\$1 00
If over four folios, for every additional folio	0 10
14 Service of each copy of Writ, if not done by the Sheriff or an Officer employed by him, when taxable to Solicitor on Sheriff's default	1 00
15 If served at a distance of over two miles from the nearest place of business or office of the Solicitor serving same, for each mile beyond such two miles	0 13
16 (For Service of Writ out of Jurisdiction, such allowance to be made as the Taxing Officer shall think fit.)	

INSTRUCTIONS AFTER COMMENCEMENT OF ACTION.

17 To Counsel in special matters	1 00
18 To Counsel in common matters	0 50
19 For special affidavits when allowed by the Taxing Officer	1 00
20 For Pleadings in action	1 50
21 For Counter-Claim, when such Claim could not heretofore form the subject of a set-off	2 00
22 For Reply to such Counter-Claims	2 00
23 To amend any pleading when the amendment is occasioned by a pleading other than a demurrer of the opposite party	2 00
24 For Confession of Defence under Rule 157	2 00
25 For Special Case in course of action	2 00
26 For Special Case when no Writ issued, or Pleadings had, and no instructions to sue allowed	3 00
27 To add parties by order of Court, or Judge	2 00
28 For Brief	2 00
29 For every Suggestion	1 00
30 For adding Parties in consequence of marriage, death, assignment, &c.	1 00
31 For Issue of Fact, by Consent, or Judge's Order ...	2 00
32 To defend added Parties after suggestion of death of original party, or on revivor	2 00
33 For Confession of action in ejectment as to the whole, or in part	1 00
34 To Strike or Reduce Special Jury	2 00
35 For such other important step or proceeding in the suit as the Taxing Officer is satisfied warrants such a charge	2 00

DRAWING PLEADINGS, &c.

36 Statement of Claim	\$2 00
37 If above ten folios, for every folio above ten, in addition	0 20
38 Statement of Defence, if five folios or under	2 00
39 If above five folios, for every folio in addition	0 20
40 Statement of Defence and Counter-Claim, up to fifteen folios	3 00
41 For every folio over fifteen	0 20
42 Reply and other Pleadings for or on behalf of Plaintiff or Defendant	2 00
43 If above ten folios, for every folio in addition	0 20
44 Demurrer	2 00
45 Petition, per folio	0 20
46 Issue for Trial of Facts by Agreement or Order, for every folio	0 20
47 Special Case, per folio	0 20
48 Drawing Interrogatories or Answers for any purpose required by law, including engrossing, per folio	0 20
49 (The above charges include engrossing, but not copies to file or serve.)	
50 Taking Cognovit and entering Judgment thereon when there has been no previous proceeding and the true debt does not exceed \$200	8 00
51 For same services when the true debt exceeds \$200 ..	12 00
52 Drawing and engrossing Cognovit and attending Execution when there have been previous proceedings ..	2 00

COPIES.

53 Of Pleadings, Brief, and other Documents, when no other provision is made, and copies properly allowable	0 10
54 Certified Copy of Pleadings or issue, for use of Judge ..	1 50
55 For every folio above fifteen, per folio	0 10
56 Of Special and Common Orders of Court	0 75
57 Of Special Order of Court above three folios, per folio ..	0 20
58 Of Summons, or Order, of a Judge	0 50

NOTICES, INCLUDING COPY.

59 Of Appearance, when duly entered and Notice given on the day of Appearance, but not otherwise ..	0 50
60 To Sheriff, to discharge Prisoner out of Custody	0 50
61 Notice, in Action for Recovery of Land, to Defend for part of Premises: not to be allowed when Defence limited by Appearance	1 00

62	If above three folios, per folio in addition	20 20
63	Notice of Claimant's or Defendant's title in Action for Recovery of Land, same fees.	
64	Notice of Entry of Appearance in Action for Recovery of Land by a party not named in Writ	0 50
65	Notice of Admission of Right and Denial of Ouster by a joint tenant	0 50
66	If above three folios, for every folio additional	0 20
67	Of Discontinuance, and one copy	0 50
68	For every additional copy, per folio	0 10
69	Of disputing Amount of Claim	0 50
70	Of Confession of Action, in Action for Recovery of Land, as to whole or part	0 50
71	Notice in lieu of Statement of Claim, and one copy	0 50
72	For every additional copy, per folio	0 10
73	Of Trial or Assessment, and one copy	0 50
74	For every additional copy, per folio	0 10
75	Demand of Residence of Plaintiff	0 50
76	Demand of Names of Partners	0 50
77	All Common Notices not above specified	0 50
78	Notice to Admit and Produce, if not exceeding two folios and one copy	0 50
79	For every additional copy, per folio	0 10
80	For each necessary folio above two	0 20
81	Notice of setting down on Motion for Judgment, or on further direction and one copy	0 50
82	For every additional copy, per folio	0 10
83	Notice of Motion in Court or Chambers, engrossing and copy to serve, per folio	0 20
84	For every additional copy, per folio	0 10
85	Notice of Taxation or Appointment to tax, and one copy	0 50
86	For every additional copy, per folio	0 10
87	For preparing and filling up for Service in any Cause or Matter, each Notice to Creditors to prove Claims, and each Notice that Cheques may be received, specifying the amounts to be received for principal and interest, and costs, if any—including mailing	0 25
88	Notice of filing Affidavits, when required, and one copy (only one notice to be allowed for a set of affidavits filed, or which ought to be filed, together)	0 50
89	For every additional copy, per folio	0 10
90	Notice by Defendant to third party, under Rule 108	1 00

PERUSALS.

91 Of Statement of Claim, or Statement of Defence, including Counter Claim, if any, if Statement or Defence special and raise difficult questions for consideration	\$1 00
92 Of Special Case by the Solicitor of any party, except the one by whom it is prepared, when Case is submitted in the Course of the Cause	2 00
93 Of Interrogatories, and Cross Interrogatories, on Commission	1 00
94 Of Affidavits and Exhibits of a party adverse in interest, filed or produced on any application, where they exceed twenty folios, so far as their perusal is necessary, per folio, over twenty folios	0 05
95 (Not in any case to exceed the sum of \$5.)	

ATTENDANCES.

96 Necessary Attendances consequent on the Service of a Notice to Produce or Admit, including making admission, altogether	1 00
97 (To be increased by Taxing Officer in cases of a special, difficult, and important nature to \$2.)	
98 For Summons in Chambers, including drawing and obtaining same	1 00
99 Attending on Return of Summons, or Notice of Motion, in Chambers (to be increased in the discretion of the Presiding Officer to \$2)	1 00
100 (Such increase to be marked at the time the order is made.)	
101 On Consultation or Conference with Counsel in special, difficult and important matters, in the discretion of the Taxing Officer in Toronto	2 00
102 (And to be increased in his discretion, as between Solicitor and Client, to such sum as he shall see fit.)	
103 Solicitor attending Court on Trial of Cause when not himself Counsel, or partner of Counsel . . .	2 00
104 And in special, difficult, and important cases, each hour necessarily present at trial (in no case to exceed \$10 per day)	2 00
(Provided the attendance of such Solicitor, and the length of time of such attendance, be duly entered at the time in the book of the Registrar, Deputy Registrar, Deputy Clerk of the Crown, Clerk of Assize, or other officer of the Court present at the time.)	

FEEs PAYABLE TO SOLICITORS.

193

105	To hear Judgment, when not given on close of Argument	\$2 00
106	To hear Judgment, when Cause on list for judgment but judgment not given	2 00
107	On Taxation of Costs, per hour	1 00
108	On Revision, per hour, when attendance required by Taxing Officer, or Revision had on notice, or order	1 00
109	To obtain or give undertaking to appear, when service accepted by a Solicitor	1 00
110	Attendance to file or serve	0 50
111	Attendance on Warrant or appointment of Master, Registrar, Special Examiner, or Referee, per hour	1 00
112	To be increased, in the discretion of the Taxing Officer in Toronto, to not exceeding per hour ..	2 00
113	Attendance on Master, or Registrar, in special matters, per hour	1 00
114	Every other necessary attendance	0 50
115	(Provided that on special and important points, and matters requiring the attendance of Counsel, before the Master, Examiner, or Referee, Judgment Clerk, or Inspector of Titles, the Taxing Officer in Toronto may, in lieu of the fees for attendance, allow a Counsel fee when Counsel attend the same, and such attendance is noted at the time.)	

BRIEFS.

116	For drawing Brief, not exceeding five folios	2 00
117	For drawing Brief, per folio, for original and necessary matter	0 20
118	Copy of Documents other than Pleadings, per folio ..	0 10
119	Copy of Brief for Second Counsel when fee taxed to him, per folio	0 10

COURT FEES (TERM FEES).

120	Fee after Statement, or, when Statement dispensed with, after filing Writ, on Defence, Joinder of Issue, Trial, on Argument before Courts, and on Judgments other than Præcipe Judgments in Mortgage Cases. No two fees to be allowed either party when such proceedings are taken, or had, between the first day of any Sittings of the Courts fixed by Rule 480 and the first day of the following Sittings so fixed	1 00
121	Fee on certified Copy of Pleadings for Judge	1 00

- 122 On every Order, of Court and Judge's Order, or
Order of Master in Chambers \$1 00
- 123 Fee on Præcipe Judgment in Mortgage Cases. 4 00

AFFIDAVITS.

- 124 Drawing Affidavits, per folio 0 20
- 125 Engrossing same to have sworn, per folio 0 10
- 126 Copies of Affidavits, per folio, when necessary 0 10
- 127 Common Affidavits of Service, including service by
post when necessary, or of payment of mileage
and of non-appearance, including copy, oath, and
attending to swear. 1 00
- 128 The Solicitor for preparing each exhibit in town or
country 0 10
- 129 Commissioner for each oath 0 20
- 130 Commissioner for marking each exhibit 0 10

DEFENDANTS.

- 131 Appearance, including attending to enter 1 00
- 132 For limiting Defence in Action for Recovery of
Land in Appearance, besides above allowance
for Appearance; not to be allowed when notice
of Limiting Defence served 1 00

JUDGMENT, RULES, OR ORDERS.

- 133 Drawing Special Minutes of Judgment or Order, per
folio, when prepared by Solicitor, under direc-
tions of Registrar, or Judgment Clerk. 0 20
- 134 Judgment for Non-appearance on Specially Indorsed
Writs, and in Action for Recovery of Land. 1 00
- 135 Attending for appointment to settle or pass Judg-
ment or Order of Court, copy and service 0 80
- 136 When served on more than one party, the extra
copies and services are to be allowed.
- 137 For every hour's attendance before proper officer on
Settling Minutes, or passing. 1 00
- 138 (To be increased in the discretion of the Officer in
special and difficult cases, when the Solicitor
attends personally, to a sum not exceeding
altogether) 5 00

LETTERS.

- 139 Letter to each Defendant before suit, only one letter
to be allowed to any defendants who are in
partnership, and when subject of suit relates to
the transactions of their partnership 0 50
- 140 Common Letters, including necessary Agency letters 0 50

- 141 With power to the Taxing Officer as between Solicitor and Client to increase the fee for special and important letters to an amount not exceeding.. 2 00
- 142 Postages—the amount actually disbursed.

SALES, BY MASTER OR AUCTIONEER.

- 143 Drawing advertisements for the sale of Real or Personal Estate, under the direction of the Court, including all copies, except for printing 2 00
- 144 And for each folio over five, per folio 0 20
(To be increased in the discretion of the Master to a sum not exceeding ten dollars, when special information has been procured for the purpose of sale.)
- 145 Copies for printing, per folio..... 0 10
- 146 Attending and making arrangements with auctioneer 1 00
- 147 Revising proof 1 00
- 148 Fee on conducting sale when held where Solicitor resides..... 5 00
- 149 If Solicitor is engaged more than three hours, for every hour beyond that time..... 1 00
- 150 Fee on conducting sale elsewhere, besides all necessary travelling and hotel expenses, when Solicitor attends with the approval of the Master previously given 10 00
- 151 If the sale occupies more than one day, the Master may allow him, in addition to his travelling expenses, *per diem*, a sum not exceeding twenty dollars.
- 152 (The Master may also allow to one other party to the suit his fees and expenses for attending sales, if, in his opinion, it is necessary and proper that he should attend.)

MISCELLANEOUS.

- 153 Statement of issues in Master's Office when required by the Master..... 2 00
- 154 For each folio over ten 0 20
- 155 (When it has been satisfactorily proved that proceedings have been taken by Solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefor in the discretion of the Taxing Officers in Toronto.)
- 156 Drawing bill of Costs as between party and party for taxation, including engrossing and copy for Taxing Officer, per folio 0 20
- 157 Copy per folio to serve 0 10

COUNSEL FEES.

- 158 Fee on Motion of Course, or on Motion for Order *Nisi*, or on Motion to make Order absolute in matters not special. \$2 00
- 159 On Special Motion for Order *Nisi*, and on special application to the Court, only one Counsel fee to be taxed. 5 00
 (To be increased to \$10 in the discretion of the Taxing Officer in Toronto, who shall mark amount to be taxed on order of Court, if any, before taxation.)
- 160 Fee on Argument on supporting or opposing application to the Court, orders *Nisi* or Argument of Demurrer, Special Case, or Appeal 10 00
- 161 To be increased in the discretion of the Taxing Officer in Toronto.
- 162 Fee with Brief on Assessment 10 00
- 163 Fee, with Brief, at Trial 10 00
- 164 To be increased by Taxing Officer in his discretion to a sum not exceeding \$20 to Senior Counsel, and \$10 to Junior Counsel, in actions of a special and important nature, provided that the Taxing Officer in Toronto shall have power to tax increased fees, but more than one Counsel fee shall not be allowed in any case not of a special and important nature, nor more than two in any case.
- 165 Fee to Counsel when Counsel attend on Argument or Examination in Chambers, where in the opinion of the Master, or Judge in Chambers, the attendance of Counsel is required 2 00
- 166 But may be increased in the discretion of the Master or Judge in Chambers to a sum not exceeding \$10.
- 167 To attend reference to Master or Referee when Counsel necessary 5 00
- 168 To be increased in special and important matters requiring the attendance of Counsel in the discretion of the Taxing Officer in Toronto.
- 169 Fee on drawing and Settling Allegations in Praeipe for Revivor in Special Cases proper for opinion of Counsel 2 00
- 170 To be increased in discretion of Taxing Officer in Toronto to an amount not exceeding \$5.
- 171 On settling Pleadings, Interrogatories, special cases, or Petitions, and advising on evidence in contested cases, in the discretion of the Taxing Officer in Toronto, not exceeding 5 00

- 172 When any fee is subject to be increased, in the discretion of the Taxing Officer in Toronto, either party to the taxation may, during its progress, require that such item shall be referred by the Local Taxing Officer to the Taxing Officer in Toronto, whose decision shall be final as to that item, but this shall not prevent an appeal from or revision of such taxation.
- 173 The Taxing Officers in Toronto may apply to a Judge or the Court on the taxation of any item which is in his discretion, or is referred to him.
- 174 No application shall be allowed by either Solicitor or Counsel to a Judge or the Court in reference to any item which is in the discretion of the Taxing Officers in Toronto, but this is not to prevent an application for revision of taxation.

CRIER.

- 175 Calling every case, with or without a Jury 0 60
- 176 Swearing each witness or constable 0 15

ALLOWANCE TO WITNESS.

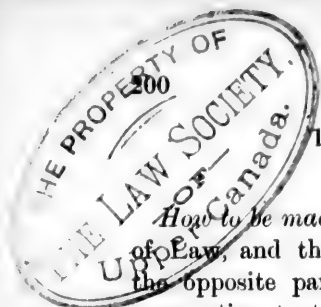
- 177 To Witnesses residing within three miles of the Court House, per diem 1 00
- 178 To Witnesses residing over three miles from the Court House 1 25
- 179 Barristers and Solicitors, Physicians and Surgeons, other than parties to the cause, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem 4 00
- 180 Engineers, Surveyors, and Architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem 4 00
- 181 If the Witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.
- 182 The Travelling Expenses of Witnesses, over three miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.

- 183 NOTE.—In taxing Costs between Solicitor and Client, the Taxing Officer may allow for services rendered not provided for by this Tariff, a reasonable compensation, as far as practicable analogous to its provisions.
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CHAPTER XVI.

MOTIONS IN COURT, AND IN CHAMBERS.

1. *Motions to the Court.*
 - (a) *How made.*
 - (b) *Leave to move.*
 - (c) *Notice of Motion.*
 - (d) *Evidence on Motions.*
 - (e) *Hearing of Motions.*
 - (f) *Motions in Particular Cases.*
2. *Motions in Chambers.*
 - (a) *Matters excluded from the Jurisdiction of the Master in Chambers.*
 - (b) *Motions in Chambers, how made.*
 - (c) *Applications in Chambers, to County Court Judges, and Local Masters.*
 - (d) *Matters excluded from the jurisdiction of County Court Judges, and Local Masters.*
 - (e) *Applications in Chambers to County Court Judges and Local Masters, how made.*
3. *Motions in Chambers, may be Adjourned before a Judge.*
4. *Actions for Administration, or Partition, which may be commenced by Motion in Chambers.*
 - (a) *Administration.*
 - (b) *Partition, or Sale.*
5. *Appeals from Chambers.*
6. *Appeals from Local Masters.*



MOTIONS IN COURT.

1. MOTIONS TO THE COURT.

(a) *How made.*

How to be made.—Formerly the practice in the Courts of Law, and the Court of Chancery, differed in the way the opposite party was brought before the Court, upon any motion to the Court. At law, the applicant applied in the first place to the Court, for a rule calling upon the party affected by the application, to shew cause why the matter of the motion should not be granted by the Court, or Judge; this rule was called a rule *nisi*, and was served upon the party affected by the motion. On the application for a rule *nisi* the Court, or Judge, exercised a discretionary power in granting or refusing it, and where no *prima facie* case appeared to be made out by the applicant, the rule in general was refused.

In Chancery, no preliminary application to the Court was necessary, but any party desiring to make any motion to the Court, in any suit, affecting any other party, usually gave a notice of the intended motion to the party affected thereby; or in cases where a fuller statement of the case was required, or the proceedings were not of recent date, or the title of the applicant depended on any complicated circumstances, a petition was served on the opposite party, indorsed with a notice of the time and place when it would be presented to the Court.

If any party served with such notice of motion, or petition, did not attend, the motion might be heard and disposed of in his absence.

Under the new system of procedure, the former practice in the Court of Chancery in this particular is adopted as regards motions to the Court in all civil proceedings, except apparently in the single instance of applications for new trials in jury cases, in which the former practice of obtaining a rule *nisi*, called in the *Rules* an "order *nisi*," is still to be followed.

All applications authorized by the *Rules* to be made to the Court, or to any Judge, are to be made by motion. (*Rule*

404) and all motions to the Court (except those which, by the former practice were entertained *ex parte*) are ordinarily to be on notice to the party affected thereby; but the Court, in its discretion, where it is of opinion that irreparable, or serious, mischief, would be occasioned by the delay which would be caused by serving notice, may make any order *ex parte*, upon such terms as to costs, and subject to such undertaking being given, as may be thought just, and any party affected by such order may move to set aside or vary it (Rule 406.) No rule, or order, to shew cause, is to be granted in any action, or matter, except where expressly authorized by the Rules, (Rule 405,) *e. g.*, on motions for new trials in jury cases. (Rules 308-10.)

(b) *Leave to move.*

Leave to serve Notice of Motion.—In some cases, before a notice of motion can be served, it is necessary that the special leave of the Court, or a Judge, to serve the notice should be obtained. This leave, when necessary, may be obtained *ex parte*. (Rule 411.)

Cases where Leave is necessary.—It appears now to be necessary to obtain leave to serve any notice of motion (except a notice of motion for an injunction) on a defendant, either with the writ of summons, or after the service of the writ of summons, and before the defendant has appeared, or is in default for want of appearance, (Rule 411,) (a). and also on any person not a party to the action, and who has not become amenable to the jurisdiction of the Court. (*Sm. Chy. Pr.*, 7th ed. 143.) Leave is also necessary where it is desired to give less than two clear days' notice of the motion. (Rules 407, 455.) Where special leave is given by the Court, or a Judge, in any case in which such leave is necessary, the notice of motion should state that it is given in pursuance of such leave, X otherwise the party served with it may disregard it.

(a) No leave was formerly necessary in Chancery. (See *Chy. O.* 262.)

Cases where Leave is not necessary.—No leave is necessary to serve any notice of motion, petition, or summons, on a defendant who has appeared, or who is in default for want of appearance. (*Rule 410.*) Nor is it in any case necessary to obtain leave to serve a defendant with notice of motion for an injunction. (*Rule 411.*) Nor is leave to serve a plaintiff necessary in any case, except, perhaps, where the motion is made by a defendant for an injunction, receiver, or mandamus, before appearance. (*See Rule 399.*) It is not clear, however, that leave can be given to a defendant to make any such motion before appearance.

(c) *Notice of Motion.*

Notice of Motion.—Where the application is required to be made on notice, the notice of the intended motion must be served at least two clear days before the day named for hearing the motion, unless special leave is obtained from the Court, or Judge, to give any shorter notice, and then such shorter notice will suffice. (*Rules 407, 462.*) When special leave is thus obtained it should be stated in the notice of motion, or the party served may disregard it. (*Moggridge v. Thomas*, 2 C. P., Cooper, 166). For form of notice of motion, see *Form No. 10.*

Although in ordinary cases a notice of motion is to be given, yet in any case where the nature of the application requires a fuller statement than can be conveniently contained in a notice of motion, or the proceedings are not of recent date, or the title of the applicant depends on any complicated circumstances, it will still be proper to bring the matter before the Court by petition, according to the former practice in Chancery.

When to be made returnable.—As we have already said, the notice of motion must be returnable not less than two clear days after service, unless special leave to give a less notice be obtained. According to the course of the Court, notices of motion are only to be given for days appointed by the Court for that purpose. Under extraordinary circumstances the Court will, upon application, allow a notice of

motion to be given for a day not so appointed. But where a notice is made returnable (without leave) on a day on which the Court does not sit, (*Armstrong v. Cayley*, 13 Chy 558), or the notice is too short, the notice is bad and the opposite party may disregard it. (*Daubeny v. Shuttleworth*, 1 Ex. D. 53; *Deykin v. Coleman*, 25 W. R. 294.)

Service of Notice of Motion.—Service may be effected on a party before appearance in the same manner as in the case of service of a writ, (see *ante* chapter v.) and after appearance, in the same manner as in the case of the service of a pleading, (see *ante* p. 92.) Where a defendant is in default for want of an appearance, the notice of motion may be served by posting it up in the office where the pleadings are required to be filed. (*Rule* 131.) But where the motion is for an attachment, personal service is, in all cases required, unless dispensed with by the Court, or a Judge. (*Munn v. Perry*, 50 L. J. Chy. 251, but see *MacLennan*, p. 301.)

In computing the two clear days required between the service and return of the motion, the day of the service, and the day appointed for the hearing of the motion, are to be excluded, and also any holidays intervening. (*Rule* 455.) The notice must be served on all parties entitled to notice of the motion, otherwise an order made in the absence of any such party, may be set aside with costs. (*McConnell v. McConnell*, 3 Chy. Ch. R. 122.) If the motion only concerns one party, he alone should be served; but if other parties are interested in the question raised by the motion, they must all be served.

(d) *Evidence on Motions.*

Affidavits in support of motion.—Evidence in support of a motion may be given by affidavit. (*Rule* 283). Affidavits to be used in support of a motion should be filed before the notice is served, (*Chy. O.* 261), and it was formerly necessary in Chancery to state in the notice of motion, all the affidavits and other papers intended to be used in support of the application. Although *Form*

No. 10, omits any reference to the evidence to be used, it would still seem necessary that the party served with the notice should, either in the notice of motion or otherwise, be formally notified of the evidence intended to be relied on, in support of the application.

Affidavits in Answer, and Reply.—Evidence in answer to a motion, or in reply, may be given by affidavit. (*Rule 283*). No provision is made by the rules for filing affidavits in answer, or reply. Under the former practice in Chancery, which will still be the rule in the Chancery Division, affidavits in answer must be filed not later than the day before that appointed for hearing the motion (*Chy. O. 261*). Affidavits in reply could be filed on the return of the motion. In the Queen's Bench, and Common Pleas, affidavits in answer or reply, were not required to be filed before the return of the motion, and this it is presumed, will be still the practice, in the Queen's Bench and Common Pleas, Divisions. All affidavits used on a motion which have not been filed, are to be stamped with the proper stamp, before they can be used. (*Rule 470*.)

Cross-examination on Affidavits.—Any person making an affidavit to be used, or which shall be used, on any motion, petition, or other proceeding, before the Court, is bound to attend, for the purpose of being cross-examined, on being served with a writ of *subpœna ad testificandum*. (*Rule 283*.) No express provision, however, is made by the *Rules* for service of notice of taking the examination. Under the former practice in Chancery, any deponent making an affidavit to be used on a motion, was liable to be subpœnaed to attend before one of the Masters, or Special Examiners, of the Court, for the purpose of being cross-examined on it. (*Chy. O. 268*.) Forty-eight hours' notice of the cross-examination was required to be given to the party on whose behalf the affidavit was filed, or on the party intending to use the affidavit. (*Chy. O.*

269.) (a). This liability of the deponent to cross-examination, however, was at an end when the proceeding for which the affidavit was filed had been disposed of. (*Catholic Printing Co. v. Wymann*, 11 W. R. 399; *Felan v. McGill*, 3 Chy. Ch. R. 56; *Cleudinuing v. Varcoe*; 7 Pr. R. 61.) Cross-examination was allowed on affidavits filed in reply, in the same manner as other affidavits. (*Re Foster*, 6 Pr. R. 95.)

The former practice in Chancery will probably be held to be the rule in all the Divisions, and forty-eight hours' notice of the examination will have to be given to the party filing, or intending to use the affidavit as under the former practice in Chancery. The witness is not necessarily entitled to forty-eight hours' notice, but only to a reasonable notice, according to circumstances. (*Re North Wheel Exmouth Mining Co.*, 31 Beav. 628).

Oral Evidence in support of Motions.—Under the former practice in Chancery, witnesses might be subpoenaed and examined *viva voce* before a Special Examiner, without any order for the purpose, in support of any motion intended to be made to the Court, or a Judge, or in Chambers, on the party requiring the evidence, giving forty-eight hours' notice of such examination to the opposite party, (*Chy. O.* 266); but at law evidence of this kind could only be obtained under an order of the Court, or a Judge. (See *R. S. O. c.* 50, ss. 174-180.)

By *Rule 285*, it is provided that "the Court or a Judge may, in any cause, or matter, where it shall appear necessary for the purpose of justice, make any order for the examination upon oath before any officer of the Court, or any other person, or persons, and at any place, of any witness, or person, and may order any depositions so taken to be filed in the Court, and may empower any party to any such cause, or matter, to give such deposition in

(a) The rule as to giving forty-eight hours' notice to the party, was not always strictly applied, when the examination took place abroad before a Special Examiner. (*De Britto v. Hillel*, 15 L. R. Eq. 213.)

evidence therein, on such terms, if any, as the Court or Judge may direct."

Messrs. Taylor and Ewart in their work on the *Judicature Act*, appear to be of opinion that this *Rule* is such an "express provision" (see *J. A. s. 12*), concerning the mode of procuring evidence to be used on motions, as to abrogate the former practice in Chancery under *Chy. O. 266, 267.* (*Taylor & Ewart, 311.*) This opinion, however, seems open to question, and it is submitted as more probable that so far as actions in the Chancery Division are concerned, the examination of witnesses in support of motions, may still be had in accordance with the former practice in Chancery without any order; and that the provisions of *Rule 285* ought to be regarded as affording an additional remedy, rather than as a substitution for the former procedure under *Chy. O. 266-7.* The latter orders being confined to cases where motions were pending, whereas *Rule 285* extends to cases where no motion is pending.

In actions in the Queen's Bench, and Common Pleas, Divisions, an order for examination of a witness in support of any motion will still be necessary, according to the former practice at law. (See *R. S. O., c. 50, ss. 174-180; Rule 283.*)

(e) *Hearing of Motions.*

Hearing of the Motion.—When the turn of counsel selected to take the motion arrives, he opens the motion with a short statement of its object; the affidavits, and other documentary evidence, are then read by counsel for the respective parties; the counsel moving then addresses the Court; he is followed by the counsel, if any, on the same side; then the counsel in opposition are heard; after which the leading counsel for the party making the motion replies.

If, on the return of the motion, the Court, or Judge, thinks other parties ought to have been notified, the motion may be dismissed, or adjourned, in order that such other parties may be notified (*Rule 408*); and any motion may

be adjourned from time to time, as the Court, or a Judge, thinks fit. (*Rule 409.*)

If the parties notified do not appear, service of the notice of motion must be proved by affidavit, in actions in the Queen's Bench, or Common Pleas, Divisions; or an affidavit, or the admission of a solicitor, in the Chancery Division. This notice of motion, with admission, or affidavit of service, should be filed with the Registrar, before the rising of the Court, stamped with the proper filing stamp.

(f) *Motions in Particular Cases.*

For Accounts, and Enquiries.—An application may be made, at any stage of the proceedings, for an order directing the taking of accounts, or making enquiries, necessary to be taken, or made, and such application may be granted by the Court, or a Judge, notwithstanding that it may appear that there is some special, or further, relief sought for, or some special issue to be tried, as to which it may be proper that the cause, or matter, should proceed in the ordinary manner. (*Rule 244.*)

Motions for Mandamus, Injunction, or Receiver.—A mandamus, or an injunction, may be granted, or a receiver appointed, by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just, or convenient, and such order may be made conditionally, or on terms, (*J. A.*, s. 17, sub-s. 8); and it may be made either *ex parte*, or on notice, (*Rule 399*); but, except in cases of emergency, notice should always be given of the application for such an order. As to cases in which such applications may now be granted, (see *MacLennan*, 22-27.)

No writ of injunction is to be issued, but the order, or judgment, is to have the same effect as a writ of injunction formerly had. (*Rule 401.*)

On such applications the Court has now, in some cases, more extensive powers than were formerly possessed by the Court of Chancery, for the protection of property in dispute, &c.

Applications for Interim Preservation of Property.—Where, by any contract, a *prima facie* case of liability is established, and there is alleged, as matter of defence, a right to be relieved, wholly or partially, from such liability, the Court, or a Judge, may, on the application of the plaintiff, at any time after his right appears from the pleadings, or, if there be no pleadings, then at any time when his right is made to appear by affidavit, or otherwise, (Rule 400,) make an order for the preservation, or interim custody, of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court, or secured. (Rule 396.)

Perishable Goods, may be ordered to be sold.—The Court, or a Judge, on the application of the plaintiff, or any party who has appeared (Rule 399) to any action, may also make any order for the sale, by any person, or persons, named in such order, and in such manner, and on such terms, as to the Court, or Judge, may seem desirable, of any goods, wares, or merchandise, which may be of a perishable nature, or likely to injure from keeping, or which, for any other just and sufficient reason, it may be desirable to have sold at once. (Rule 397.) Thus, a horse has been ordered to be sold, when the expense of keeping it was likely to equal, or exceed its value. (*Bartholomew v. Freeman*, 3 C. P. D. 316.)

Applications for Detention, and Inspection, of Property.—Application may also be made by the plaintiff, or any party to an action who has appeared, on notice to the opposite party, (Rule 399,) for an order for the detention, preservation, or inspection of any property, the subject of such action, and for authority for all, or any, of these purposes, for any person, or persons, to enter upon, or into, any land, or building, in the possession of any party to such action, to take any samples, or make any observation, or try any experiment which, may seem necessary, or expedient, for the purpose of obtaining full information or evidence. (Rule 398.)

Applications for Delivery up of Property, on which Lien claimed.—When a plaintiff, or defendant, by a counter-claim, seeks to recover specific property, other than land, and the party from whom such recovery is sought, does not dispute the title of the person seeking to recover, but claims the right to retain the property by virtue of a lien thereon for the payment of money, the party seeking to recover the property, at any time after his right appears from the pleadings, or if there be no pleadings, then as soon as his right appears to the satisfaction of the Court, by affidavit, or otherwise, may apply for an order for leave to pay the amount of money in respect of which the lien is claimed, into Court, together with such further sum, if any, for interest and costs as the Court, or Judge, may direct, to abide the event of the action, and for the delivering up of the property upon such payment being made. (*Rule 402.*)

2. MOTIONS IN CHAMBERS.

Under the new system of procedure, two modes are laid down for making applications in Chambers. All applications in Toronto to a Judge, or to the *Master in Chambers*, or to any officer sitting for the *Master in Chambers*, or before a Judge in Chambers elsewhere than in Toronto, are to be made, when not *ex parte*, on notice. On the other hand all Chamber applications to a Judge of a County Court, or to a *Local Master*, in actions pending in the High Court, are to be made by way of summons. It will thus be seen that the former practice in Chancery, as to motions, is adopted as regards applications in Toronto, or to a Judge, and that the former Common Law practice is adopted in regard to applications before the County Court Judges, and *Local Masters*.

Motions in Chambers in Toronto, to whom to be made.—Applications in Chambers will, in ordinary cases, be properly made to the *Master in Chambers*; certain applications are, however, excluded from his jurisdiction, and in such cases the application must be made to a Judge in Chambers.

(a) *Matters excluded from the Jurisdiction of the Master in Chambers.*

The *Master in Chambers* exercises, in all the Divisions of the High Court, the like jurisdiction which was formerly exercised by the Clerk of the Crown and Pleas, of the Court of Queen's Bench, in Chambers, in actions in the Court of Queen's Bench and Common Pleas: and by the Referee in Chambers, of the Court of Chancery, in suits pending in the Court of Chancery, subject to the like limitations. The following matters were, by the rules of the Courts of Law and the General Orders of the Court of Chancery, excluded from the jurisdiction of the Clerk of the Crown and Pleas, and Referee in Chambers, respectively, and are, therefore, excluded from the jurisdiction of the *Master in Chambers*:

1. Matters relating to the liberty of the subject.
 2. Matters relating to prohibitions, and injunctions.
 3. All matter relating to criminal proceedings, except by consent.
 4. The removal of causes from inferior courts, other than the removal of judgments for the purpose of having execution, except by consent.
 5. The referring of causes under the *Common Law Procedure Act*, except by consent.
 6. Reviewing taxation of costs, except by consent.
 7. Staying proceedings after verdict, except by consent.
 8. Appeals in insolvency, except by consent.
- (*R. S. O. c. 39*, s. 29; *Rule of Queen's Bench and Common Pleas*, Feb., 1870, 29 U. C., Q. B. 623.)
9. Granting writs of *habeas corpus*, and adjudicating upon the return thereof.
 10. Appeals and applications, in the nature of appeals.

11. Proceedings as to lunatics, under *R. S. O.*, c. 40, ss. 61-65, 73, 74 and 104, and *R. S. O.*, c. 49, s. 47.

12. Applications for writs of arrest.

13. Petitions for advice under *R. S. O.*, c. 107, s. 35.

14. Applications as to the custody of infants, under *R. S. O.*, c. 130, s. 1.

15. Applications as to leases, and sales, of settled estates ; to enable minors, with the approbation of the Court, to make binding settlements of their real, and personal, estate, on marriage ; and in regard to questions submitted for the opinion of the Court, in the form of special cases, on the part of such persons as may, by themselves, their committees, or guardians, or otherwise, concur therein, under *R. S. O.* c. 40, s. 85.

16. Opposed applications for administration orders.

17. Opposed applications respecting the guardianship of the person, and property, of infants.

18. *Ex parte* injunctions.

19. Proceedings as to partition, and sale, of real estate, under *R. S. O.* c. 101. (a)

20. Applications for leave to appeal, or rehear, after the time limited for that purpose has elapsed.

(*Chy. O.* 560.)

21. Applications for the Payment of Money out of Court.—The *Rules* have imposed a still further restriction on the jurisdiction of the *Master in Chambers*, by directing that no money is to be distributed, or paid out, for costs, or otherwise, without the order of a Divisional Court, or of a Judge of the High Court, in Court, or in Chambers ; except in certain cases where no order is necessary. (*Rule 424.*) This is, probably, an unintentional extension of the rule laid down in *Chy. O.* 639, which

(a) Applications for partition, or sale, on motion, cannot be made to the Master in Chambers (*re Arnott, Chatterton v. Chatterton*, 8 P. R. 39.)

merely restricted the right of Local Masters to make such orders in administration, and partition suits, and was intended to secure to the Court the power to review the proceedings in such suits. This *Rule* will probably be modified by further Rules.

(b) *Motions in Chambers, how made.*

Applications to a Judge, or to the Master in Chambers.—All applications to a Judge, or to the *Master in Chambers*, or to any officer sitting for the *Master in Chambers*, not made *ex parte*, are to be made on notice, and no summons, or order, to show cause, is necessary on any such application. (*Rules* 412, 404, 405.) In general, the notice will be given of the motion according to the former practice in Chancery, but in proper cases the application may be made on petition, wherever a fuller statement of the case is necessary than can be conveniently contained in a notice of motion, or where the proceedings are not of recent date, or the title of the applicant depends on any complicated circumstances. Where notice of motion is given, it must be served at least two clear days before the day named for the hearing of the motion, and Sundays and other holidays intervening (*Rule* 407), are not to be counted in computing the two clear days. (*Rule* 455.)

Leave to serve Notice of Motion; when necessary.—In certain cases, before a notice of motion in Chambers can be served, leave must be obtained in the same manner as already pointed out in the former part of this chapter, in reference to motions in Court, *e.g.*, where the defendant has not been served with the writ of summons; or if served, has not appeared, and is not in default for want of appearance; or where the party to be served is not a party to the action and has not become amenable to the jurisdiction of the Court; or where it is desired to give less than the two clear days' notice of the motion; or to make the motion on a day on which Chambers are not held. Where leave is obtained, it should be stated in the notice of motion, that the notice is served in pursuance of such leave. Leave may be obtained *ex parte*. (See *ante* pp. 201-202.)

Notice of Motion, form of.—In general, the notice of motion is to be in the *Form* No. 11, but in certain particular cases, in which the jurisdiction of the *Master in Chambers* is excluded in the event of the motion being opposed, *e. g.*, applications for administration, or respecting the guardianship of infants, (*Chy. O.* 560; *Rule* 420*a.*) the notice of motion may be in the alternative form shown in *Form* No. 12.

Service of.—See *ante* p. 203.

Evidence.—What has already been said in the previous part of this chapter as to the evidence which may be used in support of, and in answer to, motions in Court, and as to the time of filing affidavits, and as to the examination of witnesses before Examiners, and cross-examining deponents who have made affidavits, applies equally to motions in Chambers, and it is not, therefore, necessary to recapitulate what has been already said on these matters.

Filing Affidavits.—In actions in the Chancery Division, affidavits in support of a motion in Chambers, or in answer, or reply, have to be filed in the office of the *Clerk of Records and Writs*. In actions in the other Divisions, they are to be filed with the Clerk in Chambers.

Orders to bear name of Judge, &c.—All orders made in Chambers are to be marked with the name of the Judge, or officer, by whom they are made. (*Rule* 413.)

(c) *Applications in Chambers, to County Court Judges, and Local Masters.*

After the first of January, 1882, the same jurisdiction which is conferred by the *Rules* on the *Master in Chambers*, is in certain cases, with certain exceptions, conferred upon County Court Judges, (except the Judges of the County Court of York,) and *Local Masters*.

Where the *Local Master* is also the Judge of the County Court, his jurisdiction extends to actions in all the Divisions of the High Court. Where the *Local Master* is a practising barrister, or solicitor, or takes out his certificate

to practise, the Judge of the County Court has also jurisdiction in actions in all the Divisions ; but where the Judge of the County Court is not also *Local Master*, and the latter does not practise as a barrister, or solicitor, or take out his certificate to practise, the latter has jurisdiction in actions in the Chancery Division, and the jurisdiction of the County Court Judge is, in that case, confined to actions in the Queen's Bench, and Common Pleas Divisions. (*Rule 422.*)

(d) *Matters excluded from the jurisdiction of County Court Judges, and Local Masters.*

In addition to the matters excluded from the jurisdiction of the *Master in Chambers*, (see *ante* p. 210,) the following applications are excluded from the jurisdiction of the County Judges, and *Local Masters*, viz :—

1. Applications for leave to serve a writ of summons, or notice of a writ of summons, out of the jurisdiction. (*Rule 422.*)

2. Applications for the allowance of service, of writs, or notices in lieu of writs, out of the jurisdiction. (*Ib.*)

3. Applications, required to be made on notice to the opposite party, in actions where the solicitors for all parties do not reside, or have not offices, in the county town of the county in which the action is brought ; or where any party who has no solicitor, does not reside in, or has not a place of business in, the county, or union of counties. Except by written consent of all parties. (*Rule 422, a. 423.*)

4. Applications commenced in any other county, except that in which he is Judge, or Master. (*Rule 422.*)

(e) *Applications in Chambers, to County Court Judges, and Local Masters, how made.*

Applications in Chambers, to a County Court Judge, or *Local Master*, are to be made upon summons whenever it is necessary to give notice thereof. (*Rule 425.*) (a)

(a) But see *post* p. 216, note (a).

When the application is required to be made upon summons, the party moving must first prepare the necessary affidavits required in support of the application, and then apply *ex parte* to the County Judge, or *Local Master*, having jurisdiction, for a summons calling upon the opposite party to attend before such Judge or Master, at a time and place named in the summons, to show cause why the order asked by the applicant should not be granted. The summons is to be prepared by the applicant or his solicitor, and is to be signed by the proper officer, and when so signed is to be deemed to be issued. The person obtaining a summons is to leave a copy of the summons with the officer signing the same. (*Rule 425*). For form of summons, see *Form No. 108*.

A copy of the summons is required to be served upon the opposite party, and the subsequent proceedings on the motion, are similar to those on applications commenced by notice of motion.

3. MOTIONS IN CHAMBERS, MAY BE ADJOURNED BEFORE A JUDGE.

Power of Master in Chambers and others, to refer matters to Judge of the High Court.—The *Master in Chambers*, or any County Court Judge, or *Local Master*, may refer any matter to a Judge of the High Court, who may either dispose of it, or remit it to the officer by whom it was referred, with such directions as may seem proper. (*Rule 426*).

4. ACTIONS FOR ADMINISTRATION, OR PARTITION, WHICH MAY BE COMMENCED BY MOTION IN CHAMBERS.

Actions for the administration of the real, and personal, estate, of a deceased person; and actions by tenants in common, for the partition, or sale, of the estate held in common, may be commenced, and prosecuted, in all the Divisions of the High Court, according to the former practice in the Court of Chancery. (*Rules 3, 88.*)

(a) Administration.

Application for Administration, to whom to be made.—The application for administration may be made to the *Master in Chambers*, or if opposed, to a Judge in Chambers at Toronto, (*Rule 3*; *Chy. O.* 468, 560, ss. 8,) or it may be made on behalf of any adult person, whether opposed or not, to the *Local Master* in the county town of the county (other than the County of York) where the deceased died. (*Chy. O.* 638, *Rule 3.*)

By whom application may be made.—The application may be made by any person claiming to be a creditor, or a specific, or pecuniary, or residuary, legatee, or the next of kin, or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person, (*Chy. O.* 467,) or by an executor, or administrator (*Chy. O.* 471.) If the action be brought by a legatee, or next of kin, it cannot be commenced before the lapse of a year from the death of the deceased. (*Vivian v. Westbrooke*, 13 *Chy.* 461; *Slater v. Slater*, 3 *Chy. Ch. R.* 1; and see *Holmested's Chy. Orders*, 10th January, 1879, pp. 1-3.)

How made.—The application is to be made upon notice of motion (a), to be returnable not less than fourteen days after service, (*Chy. O.* 552, 638,) and is to be served on the executor, or administrator, (*Chy. O.* 468,) and when administration of the realty is sought, upon some person interested in the real estate, (*Chy. O.* 472,) unless the plaintiff himself be so interested. For form of notice of motion, see *Form No. 12*. Where an executor, or administrator, applies, the application may be made *ex parte*. (*Holmested's Chy. Orders*, 10th January, 1879, p. 3.) The application must be supported by affidavits, establishing the plaintiff's right to administration.

Form of Judgment.—For form of a judgment for administration, see *Form No. 171*.

(a) See, however, *Rule 425*, which provides that every application to a C. C. Judge or Local Master is to be made by summons. *Rules 3* and *425* appear to be inconsistent with each other,

Under the former practice, where the order was obtained against an executor, or administrator, there was no enquiry as to wilful neglect or default. (*Harrison v. McGlashan*, 7 Chy. 531, and see *Holmsted's Chy. Orders* of 10th January, 1879, p. 2;) but where the order was obtained by the executor, or administrator, himself, the direction to enquire as to wilful neglect and default was inserted, (*Ledgerwood v. Legerwood*, 7 Chy. 584) and it is presumed that under an order in the *Form* No. 171 the enquiries as to wilful neglect and default, will be made or not, according as the order is obtained by, or against, the executors, or administrators.

(b) *Partition, or Sale.*

Application for Partition, or Sale, to whom to be made.—The application for a judgment of partition, or sale, may be made to a Judge in Chambers, at Toronto, (*Chy. O.* 640,) this being a matter altogether excluded from the jurisdiction of the *Master in Chambers*, (*Re Arnott—Chatterton v. Chatterton*, 8 Pr. R. 39, 15 C. L. J. 136,) or it may be made to the *Local Master* in any county, (other than the County of York,) wherein the land sought to be affected lies. (*Chy. O.* 640.) If the land to be partitioned, or sold, lies in more than one county, the application must be made to the presiding Judge in Chambers, at Toronto. (*Ib.*, and see *Clark v. Clark*, 8 Pr. R. 156.)

By whom Application may be made.—The application can only be made by an adult person entitled to partition. When the party in possession claims to be entitled absolutely, an action should be commenced by writ. (*Re McMillan Patterson v. McMillan*, 17 C. L. J. 86; *Hopkins v. Hopkins*, before Boyd, C., 5th Sept., 1881.)

Where more than one application has been made, the actions may be consolidated. (*Chy. O.* 641.)

How made.—The application is to be made upon notice of motion (a), returnable not less than fourteen days after

(a) See, however, *Rule* 425, *ante*, p. 214. This *Rule* does not harmonize with *Rule* 3, which provides that *Chy. O.* 640, is to be in force.

service, (*Chy. O. 640*), and is to be served upon one or more of the persons entitled to a share of the estate of which partition is sought, (*Ib.*) and must be supported by affidavits showing the applicant's title, and the estates, and interests, of all other persons interested, in the land in question.

Form of Judgment.—For form of judgment, see *Form No. 172*.

5. APPEALS FROM CHAMBERS.

Appeals from a Judge in Chambers.—Orders made by a Judge in Chambers, except orders made in the exercise of his discretion, may be appealed from to a Divisional Court, (see *ante* p. 7,) and also by leave of the Judge to the Court of Appeal, (see *ante* p. 4.)

Every appeal to the Court from any decision at Chambers, is to be by motion, and to be made within eight days after the decision appealed against, or if no Court to which such appeal can be made shall sit within such eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days. (*Rule 414*.)

Appeals from the Master in Chambers, County Court Judges, and Local Masters.—An appeal lies from any order, or decision, of the *Master in Chambers*, County Court Judge, or *Local Master*, to a Judge of the High Court. (*Rule 427*). Appeals of this kind have heretofore been made to a Judge in Chambers, and it is probable that they will still be so heard. (See *Rule 3, Chy. O. 642*.)

The appeal is to be brought by notice of motion, to be given within four days after the decision complained of, or within such further time as may be allowed by a Judge of the High Court, or by the officer whose decision is complained of. (*Rule 427*.)

The motion must be made within eight days after the decision, or within such further time as may be allowed, as above mentioned. (*Ib.*)

A consent to the County Court Judge, or *Local Master*, hearing an application, does not prejudice the right to appeal from his decision. (*Rule 427.*) The appeal is no stay of proceedings unless so ordered by a Judge of the High Court, or the Judge or officer, whose decision is complained of. *Ib.*

For the purpose of the appeal, the *Deputy Registrar*, *Deputy Clerk of the Crown*, or *Local Registrar*, is, on *præcipe*, to transmit all necessary documents by mail, pre-paid and registered, or by such other mode of transmission as all parties interested in such documents agree to. (*Rule 427.*) The parties requiring the documents to be transmitted, must deliver to the officer, the cost of transmission, and re-transmission. When transmitting the documents, the officer should state the purpose for which the documents are forwarded, and enclose the necessary postage to pay for their re-transmission.

6. APPEALS FROM LOCAL MASTERS.

Appeals from Local Masters.—An appeal lies to a Judge in Chambers, from any judgment, order, report, ruling, or other determination of any *Local Master*. The appeal is to be brought by notice of motion, returnable at least seven days after service, and it must be set down for argument, not later than the Saturday preceding the day on which it is to be argued, and must be brought on for argument within a month (excluding vacation) of the making of such judgment order, report, ruling, or determination, &c., or within such further time as a Judge may allow. (*Rule 3, Chy. O. 642.*) The provisions of this *Rule* do not appear to harmonize with *Rule 427*, referred to above.

CHAPTER XVII.

PROCEEDINGS TO OBTAIN DISCLOSURE OF RESIDENCE, &C.,
OF PLAINTIFF,—AND NAMES OF PARTNERS.

1. *Proceedings to obtain Disclosure of Residence, and Occupation, of Plaintiff.*
2. *Proceedings to obtain Disclosure of Names of Partners, suing, or sued, in the name of a Firm.*

1. PROCEEDINGS TO OBTAIN DISCLOSURE OF RESIDENCE,
AND OCCUPATION, OF PLAINTIFF.

After a defendant has been served with a writ, he may, by himself, or his solicitor, and either before, or after, he has entered an appearance, serve a demand in writing on the solicitor whose name is signed to, or indorsed on, the writ, requiring him to declare forthwith, whether such writ has been issued by him, or with his authority, or privity. If he answers in the affirmative, the defendant may make application to the Court, or a Judge, for an order requiring the plaintiff's solicitor to disclose, in writing, within a time to be limited by such Court, or Judge, the profession, or occupation, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ appears to have issued. If, on the other hand, the solicitor shall declare the writ was not issued by him, or with his authority, or privity, the defendant may apply to the Court, or a Judge, to stay the proceedings. (*Rule 29.*)

Where an action is commenced by a solicitor without authority, the plaintiff may, on notice to the defendant, and the solicitor by whom the writ is issued, move that the action be dismissed, and that the solicitor pay the plaintiff's costs as between solicitor and client, and the

defendant's as between party and party. (*Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Chy. D. 310, and see *Chisholm v. Sheldon*. 1 Chy. 294.)

2. PROCEEDINGS TO OBTAIN DISCLOSURE OF NAMES OF PARTNERS, SUING, OR SUED, IN THE NAME OF A FIRM.

Where a writ is sued out in the name of a firm, the plaintiffs, or their solicitor, on demand, in writing, by or on behalf of the defendants, are forthwith to declare the names, and places of residence, of all the persons constituting the firm, (*Rule 30*); and on the application of a defendant, the proceedings may be stayed on the failure of the plaintiff, or his solicitors, to comply with such demand, upon such terms as the Court, or a Judge, may direct, (*Rule 30*.) and when an action is brought by, or against, a firm, in the name of the firm, any party to the action may apply in Chambers for an order, (see *Form No. 120*.) to compel the delivery of a statement of the names of the persons who are co-partners in such firm, under oath, or otherwise, as the Judge may direct, (*Rule 100*). Where the names of the partners are declared, the action is to proceed as if the partners had been named as plaintiffs in the writ; but the style of the cause is not to be changed, but the proceedings are to be continued in the name of the firm. (*Rule 30 b.*) For form of order to deliver names of partners, see *Form No. 120*.

The proceedings referred to in this chapter should only be resorted to, where some sufficient reason exists, otherwise the expense of the proceeding will have to be borne by the party taking it, in any event. It is also necessary to bear in mind that the serving of the demand above mentioned does not stay the proceedings, and the entry of appearance is no waiver of the right to make the demand, where it is necessary.

CHAPTER XVIII.

SECURITY FOR COSTS.

1. *When Order for Security may be obtained on Præcipe.*
 - (a) *Order on Præcipe, how obtained.*
2. *Special Application for Security for Costs.*
3. *Security, how given.*

1. WHEN ORDER FOR SECURITY MAY BE OBTAINED
ON PRÆCIPE.

Where it appears by the writ of summons, notice, or other proceeding by which an action is instituted, or by an indorsement thereon, that the plaintiff (see *J. A.* s. 91,) resides out of the jurisdiction; the defendant, on application to the proper officer, may obtain on *præcipe* an order requiring the plaintiff to give security in \$400 for the defendant's costs of the action, staying all further proceedings in the meantime, and directing that in default of such security being given, the action be dismissed with costs against such defendant, unless the Court, or a Judge, upon special application for that purpose, shall otherwise order. (*Rule 431.*) Under the former practice in Chancery an order for security for costs did not stay all proceedings, but only suspended the time for answering, and the plaintiff might, notwithstanding the service of the order, proceed with a motion for an interim injunction; but under the new practice, all proceedings are to be stayed by the order, unless on special application the Court, or Judge, shall think fit to direct otherwise.

When the plaintiff is stated to be resident in the jurisdiction, but temporarily residing out of the jurisdiction, the order ought not to be taken on *præcipe*, (*Wilson v.*

Wilson, 6 Pr. R. 152, and see *Arch. Pr.* 13th ed., 1140), neither can the order be made, if any one of several plaintiffs, be resident within the jurisdiction. (*Arch. Pr.* 13th ed., 1139.) A defendant in a suit for alimony, is not entitled to security for costs. (*Bennett v. Bennett*, 7 Pr. R. 54.)

(a) *Order on Præcipe, how obtained.*

The application for the order must be made to the officer, with whom the appearance is to be filed, in the case of actions commenced by writ. Where the proceeding is commenced by the service of a petition, or notice of motion, the application may be made to the officer in whose office, the affidavits in support of the petition, or motion, are filed.

Practical Directions.—Produce to the proper officer, the copy of the writ, notice, or other proceeding by which the action is instituted, showing the plaintiff's residence to be out of the jurisdiction, and file with him a *præcipe* for the order. He will thereupon draw up and issue the order.

Form of Order.—No form of order is given in the *Rules*, but the order should require the plaintiff within four weeks from the service of the order, to give security in \$400 for the defendant's costs of the action, stay all further proceedings in the meantime, and direct that in default of the security being given, the action be dismissed against such defendant, with costs, to be paid by the plaintiff forthwith after taxation, unless the Court, or Judge, upon special application for that purpose, shall otherwise order. (*Rule 431.*)

2. SPECIAL APPLICATION FOR SECURITY FOR COSTS.

Special application for security, when necessary.—In all other cases where the defendant is entitled to security for costs, a special application in Chambers is necessary to compel the plaintiff to give security.

When Special Application may be made.—The application should be made immediately after appearance, (*De la Preuve v. Duc de Biron*, 4 T. R. 697,) if the fact entitling the defendant to security for costs, is then known to him; and if not, then as soon thereafter as it comes to his knowledge. If the defendant takes a step in the cause, other than the entry of his appearance, after he has knowledge of the facts entitling him to apply for security, he may be held to have waived his right thereto. (*Arthur v. Brown*, 3 Chy. Ch. R. 396; *Robertson v. McMaster*, 8 Pr. R. 14); but, see *contra*, *Arch. Pr.* 13th ed., 1143, where it is stated that the application may be made any time after appearance and before issue joined. But where a defendant had lost his right to security as against the original plaintiff, he was held entitled to security against another person resident out of the jurisdiction to whom the plaintiff assigned his interest, (*Thompson v. Callaghan*, 3 Chy. Ch. R. 15).

When the plaintiff is, in fact, resident out of the jurisdiction, but it does not so appear by the writ, summons, notice, or other proceeding by which the action is instituted, or any indorsement thereon, a special application is necessary.

There are also other facts, besides the residence of the plaintiff out of the jurisdiction, which entitle a defendant to make a special application for security, *e. g.*,—

Where the plaintiff is insolvent, and the suit is brought, for the benefit of some other person. (*Mason v. Jeffrey*, 2 Chy. Ch. R. 15.)

Where a plaintiff parts with his interest in the suit, *pendente lite*, further proceedings, may be stayed until security be given, or the suit revived in the name of the assignee. (*Swan v. Adams*, 7 Pr. R. 147.) An official assignee in insolvency, however, cannot be compelled to give security. (*Vars v. Gould*, 7 Pr. R. 31.) So also the pendency of another suit in respect of the same matter in Ontario, or in any other country; or the fact that the costs

of a former suit in respect of the same matter, ordered to be paid by the plaintiff, remain unpaid, entitle a defendant to apply for security for costs. (*R. S. O. c. 40, ss. 97, 98, Ib. c. 50, ss. 70, 72.*) But where the costs of the former suit were payable out of an estate, an application for security was refused. (*Curtis v. McNabb*, 7 Pr. R. 246.) A defendant is also entitled to security for costs where successive actions of ejectment are brought. (*R. S. O. c. 51, s. 73.*) So, also, in actions brought to recover penalties, the defendant, not being a corporation aggregate, (see *Morton v. Consolidated Bank*, 45 U. C. Q. B. 163,) may apply for security on filing an affidavit of merits, and showing that the plaintiff, or informer, is not possessed of property sufficient to answer the costs of the defendant. (*R. S. O. c. 50, s. 71.*)

A defendant who files a counter-claim unconnected with the plaintiff's cause of action, may be required to give security for costs, (*T. L. J. Fisher*, 2 P. D. 115); but not if the counter-claim is in respect of the same subject matter as the plaintiff's claim. (*Mapleson v. Masini*, 5 Q. B. D. 144.)

A plaintiff within the jurisdiction, whose residence cannot be found, or who gives a fictitious address, will be ordered to give security, (*Taylor's Chy. O.*, 291); and where security had been ordered to be given by a plaintiff resident out of the jurisdiction, who had wilfully given a fictitious address in the bill, an application to discharge the order, on the plaintiff coming to reside within the jurisdiction, was refused. (*Waldron v. McWalter*, 6 Pr. R. 145.) Where security is ordered on a special application, it is to be for such amount, and given at such time, or times, and in such manner and form, as the Court, or Judge, directs. (*Rule 429.*) Where a bond is directed to be given, it must be given to the party, or person, requiring the security, and not an officer of the Court, unless the Court, or Judge, otherwise directs. (*Rule 430.*)

It is doubtful whether, after a plaintiff has complied with an order for security, a subsequent application can be made, to compel him to give additional security. (See

Simon v. La Banque Nationale, 7 Pr. R. 422; *Arch. Pr.* 13th ed., 1145.)

Formerly, at law, unless the application were preceded by a demand for security, the summons to show cause was no stay of proceedings.

The time for giving the security may be limited by the order therefor, or any subsequent order, and if it be not given within the time limited, the action may be dismissed, with costs. (42 Vic. c. 15, s. 2.)

When Order may be Refused, or Discharged.—A plaintiff resident out of the jurisdiction, on shewing that he has sufficient property within the jurisdiction to answer costs, may be relieved from giving security, (*Re Carroll*, 2 Chy. Ch. R. 305; *Ganson v. Finch*, 3 Chy. Ch. R. 296) and if the possession of the property by the plaintiff be known to the solicitor when the order is taken out on *præcipe*, the order may be discharged, with costs. (*Ib.*) But the acquisition of property subsequent to the making of the order is no ground for discharging it. (*Reaume v. Leavitt*, 6 Pr. R. 70.) As to the nature of the property which is considered sufficient, (see *Re Carroll*, *supra*; *Higgins v. Higgins*, 6 Pr. R. 147; *McKenzie v. Sinton*, 6 Pr. R. 282; *Wilson v. Wilson*, *Ib.* 152.) Where the plaintiff has returned permanently, to reside within the jurisdiction, the order may be discharged. (*Harvey v. Smith*, 1 Chy. Ch. R. 392; but see *Marsh v. Beard*, 1 Chy. Ch. R. 390; *Waldron v. McWalter*, 6 Pr. R. 145.)

3. SECURITY, HOW GIVEN.

Where a bond is to be given as security for costs, it must, unless the Court, or a Judge, otherwise directs, be given to the party, or persons requiring the security, and not to an officer of the Court, (*Rule 430*), as was formerly the practice in Chancery, and it must be for the amount mentioned in the order. In orders issued on *præcipe*, the amount is fixed at \$400: on special applications, the amount of the security to be given, is in the discretion of the Court, or Judge.

Only one surety is necessary. (*Beaton v. Boomer*, 1 C. L.

J. N. S. 108, and see *Chitty's Forms*, 11th ed., 220); unless the defendant, before the bond is prepared, gives notice that he requires two. (*Donnelly v. Jones*, 4 Chy. Ch. R. 48.) The plaintiff's solicitor cannot be his surety. (*Panton v. Jaber-touche*, 1 Ph. 265; *Beckett v. Wragge*, 1 Chy. Ch. R. 5.) No affidavit of execution, or justification, need be filed in actions in the Chancery Division, unless the execution of the bond, or solvency of the surety, is brought in question by the defendant. (*Ib.*) In actions in the Queen's Bench, and Common Pleas, Divisions, affidavits of execution, and of justification, by the surety must be filed with the bond. The bond must cover past, as well as future costs. For form of conditions of bond (see *Leggo's Forms*, 2nd ed. Nos. 396, 397; *Chitty's Forms*, 11th ed. 220; *Beaton v. Boomer*, *supra.*) The plaintiff, instead of giving a bond, may obtain an order giving him leave to pay \$400 into Court, as security. (*Cliffe v. Wilkinson*, 4 Sim. 122; *Ganson v. Finch*, 3 Chy. Ch. R. 296.) This order may be granted *ex parte*, but if so, all material facts must be disclosed on the application, or it may be set aside. (*Re Howland*, 4 Chy. Ch. R. 6). As to payment out of the money so paid in (see *Luther v. Ward*, 2 Chy. Ch. R. 75.)

The bond being duly prepared and executed, must be filed in the office where the appearance is filed, and notice of the filing, served on the party obtaining the order.

Where the bond is filed in an action in the Chancery Division, the opposite party is entitled, within two days after being served with the notice of filing, to give notice of motion in Chambers to disallow the bond; otherwise the bond will stand allowed. (*Taylor's Chy. O. p.* 293.)

In actions in the Queen's Bench, and Common Pleas, Divisions, an appointment must be obtained from the officer with whom the bond is filed, for the allowance thereof. A copy of this appointment must be served with the notice of filing: on the return of the appointment the officer will dispose of any questions raised as to the sufficiency of the bond, or the surety, and allow, or disallow, the bond.

CHAPTER XIX.

DISCOVERY.

EXAMINATION OF PARTIES—PRODUCTION OF DOCUMENTS.

1. *Examination of Parties for Discovery.*
 - (a) *In the Chancery Division.*
 - (b) *By Plaintiff.*
 - (c) *By Defendant.*
 - (d) *The Examination.*
2. *Examination for Discovery, in the Queen's Bench, and Common Pleas, Divisions.*
 - (e) *When it may be had.*
 - (f) *How obtained.*
3. *Costs of Examination for Discovery.*
4. *Examination may be used in Evidence.*
5. *Production of Documents.*
 - (a) *Production under Order, of course.*
 - (b) *When Order obtainable.*
 - (c) *Affidavit on Production.*
 - (d) *Documents to be produced.*
 - (e) *Documents which need not be produced.*
 - (f) *Cross-Examination.*
 - (g) *Consequence of Non-production.*
6. *Production under Special Order.*
7. *Production on Notice.*

I. EXAMINATION OF PARTIES FOR DISCOVERY.

One of the most important and beneficial proceedings in Equity practice was that relating to discovery, by means of which the suitor was enabled to ascertain before the trial

what facts were within his adversary's knowledge, and what documents in his possession, (subject to certain exceptions), which related to the matters in controversy. This procedure was recently introduced in a modified form into the practice at law. (See *R. S. O. c. 50*, ss. 156, 167, 169.)

Discovery was formerly obtained by the oral examination under oath of the party, (or in the case of a corporation, of its officers,) and by obtaining an order requiring the adverse party to produce under oath all documents in his possession; the deponent making the affidavit in obedience to the order, being in equity, though not at law, liable to be cross-examined thereon. (*Campbell v. McArthur*, 7 Pr. R. 46; *Dobson v. Dobson*, *Ib.* 256.)

The former practice regulating the examination of parties for the purpose of discovery, differed in Chancery and at Law, and this is one of those points in which the practice of the High Court will not be uniform. In actions in the Chancery Division, the former Chancery practice in reference to the examination of parties, will govern; and in the other Divisions the former practice in the Courts of Law will govern. The practice as to the production of documents is, however, the same in all the Divisions.

It will be convenient to consider separately the practice as to the examination of parties for discovery, and we will, in the first place, deal with it as far as the Chancery Division is concerned.

(a) *In the Chancery Division.*

Under the former practice in Chancery, the plaintiff as soon as the answer, if any, was filed, or as soon as the time for answering had expired, (*Chy. O.* 240,) at any time before the hearing, was entitled, without any order, to obtain an appointment from a special examiner, and issue a *subpœna* requiring the defendant to attend to be examined. (*Chy. O.* 138.) The defendant, on being served therewith, was bound to attend and submit to examination as to the matters in question in the suit, and by this examination the plaintiff often obtained material informa-

tion, which enabled him to amend, or remodel, his bill, so as to make it meet the defence set up in the answer, if any, or so to mould the allegations in his bill, as the examination might show to be necessary, in order to make them accord with the real facts of his case, which a plaintiff, until he had obtained discovery from the defendant, was often imperfectly informed of.

(b) *By Plaintiff.*

When examination can be had, by Plaintiff.—Under the present practice, the plaintiff's right to examine the defendant, arises as soon as a statement of defence has been filed, or as soon as the time for filing it has expired. The plaintiff is also entitled to examine for discovery, any third party against whom the defendant claims contribution, &c., and who, having been served with notice under *Rule 108*, has appeared, and obtained leave to defend the action, as though such third party had been originally made a defendant. (*McAllister v. The Bishop of Rochester*, 5 C. P. D. 194.)

The plaintiff is also entitled to examine in the same way, any person for whose immediate benefit a suit is defended, (*Rule 224*; and see *Chy. O. 139*.) and also the officer of any defendant corporation aggregate who might formerly have been made a party to a bill for discovery, (see *Chy. O. 63*; *Rule 227*.) and persons who were, but have ceased to be officers of such corporation, may be so examined. (*Rule 227*.) As to the officers liable to be so examined (see *McLean v. Great Western R. W. Co.*, 7 Pr. R. 358; *Consolidated Bank v. Neelon, Ib.*, 251.) In the latter case a special order was obtained, which does not seem to have been necessary, *Chy. O. 63* expressly providing that such officers may be examined in the same way as a party, and *Chy. O. 138*, providing that a party may be examined without any special order.

(c) *By Defendant.*

When examination may be had, by Defendant.—Under the former practice, the defendant's right to examine the plaintiff, arose as soon as he had filed his answer, and at any time before the hearing. (*Chy. O.* 140.)

A defendant who had not answered, was not entitled to examine the plaintiff.

Under the present practice the defendant's right to examine the plaintiff in an action in the Chancery Division, will arise as soon as he has filed his statement of defence: where a defendant does not appear, or makes default in delivering a defence, he will not be entitled to examine the plaintiff. A defendant is also entitled to examine a third party, from whom he claims contribution, &c., who has been served with notice under *Rule* 108, and who has appeared. The examination may be had as soon as the third party has filed a reply, or as soon as the time for filing a reply has expired. (*Rule* 223, and see *McAllister v. The Bishop of Rochester*, 5 C. P. D. 194.) A third party who has been added by counter-claim under *Rule* 165, seems also liable to examination by the defendant who added him, although there appears to be no specific provision in the *Rules* to that effect; but as under the former practice in Chancery in a cross suit, the defendant would be entitled to discovery, so it would seem he is entitled to the like relief where the third party is brought before the Court by counter claim, (see *J. A.* s. 16, ss. 4, 8, and see *McAllister v. Bishop of Rochester*, 5 C. P. D. 194.) The defendant may also examine the officers of a plaintiff corporation aggregate (*Chy. O.* 64, and *Rule* 227), or persons who were, but have ceased to be such officers. (*Ib.*) The defendant may also examine any party for whose immediate benefit, an action is prosecuted (*Rule* 224), or a co-defendant whose interest is identical with that of the plaintiff. (*Moore v. Boyd*, 8 Pr. R. 413.)

(d) *The Examination.*

Where Examination to be held.—The examination must usually be held in the county where the party to be examined resides, a special order is necessary, if the examination for any reason is required to be held elsewhere, (*Gallagher v. Gairdner*, 2 Chy. Ch. R. 480, *McDermid v. McDermid*, *Id.* 372, *Campbell v. Tucker*, 7 Pr. R. 136.) Where a defendant resided in the Province of Quebec, a *subpœna* under C. S. C. c. 79 s. 4, was ordered to issue for the purpose of compelling his attendance for examination in Ontario. (*Moffatt v. Prentice*, 6 Pr. R. 33.)

Where a party resident in Quebec came to Toronto on a Saturday, intending to return on Monday, and on the latter day was served with a *subpœna* to attend for examination on the following Thursday, and paid \$1.00, which *subpœna* he disobeyed, a motion to take the bill *pro confesso* against him for such default was refused. (*Bolkow v. Foster*, 7 Pr. R. 388.)

Before whom Examination to be held.—The proper officer to take the examination, is one of the *Special Examiners*; and it may be taken in short hand. (*Rule 219.*)

How attendance of party procured.—It is necessary to obtain an appointment from the *Examiner*, and to issue a *subpœna*. The party to be examined must be served with the *subpœna*, and paid the usual witness fees, (*Vardon v. Vardon*, 7 Pr. R. 436.) and a copy of the appointment should be served on his solicitor, (*Fowler v. Boulton*, 12 Chy. 440.) but it is not necessary to serve a copy of the appointment on the party. (*Campbell v. Tucker*, 7 Pr. 135.) The appointment and *subpœna* should be served in sufficient time to enable the party and his solicitor to attend. The *subpœna* should not bear date before the time at which the party issuing it is entitled to examine the party served with the *subpœna*, or it will be irregular. (*McMurray v. Grand Trunk R. W. Co.* 3 Chy. Ch. R. 130.)

Consequence of Non-attendance.—The *Rules* make no express provision, and it is therefore presumed that the consequences of non-attendance for examination, for discovery will be similar to those under the former practice. Under that practice, the defaulting party might be proceeded against as for contempt, and in addition to any other remedy, a plaintiff was entitled to apply to have the bill taken *pro confesso* against a defaulting defendant; and a defendant was entitled to apply to have the bill dismissed where a plaintiff made default. (*Chy O.* 144.)

Under the new practice, the defaulting party will, in the Chancery Division, be still liable to be proceeded against as for contempt; and a plaintiff will, in addition, be entitled to move to have the defence, if any, of a defaulting defendant struck out, and to be placed in the same position as if he had not defended; and a defendant will be entitled to move, where a plaintiff makes default, that the action be dismissed for want of prosecution. (See *Rule 236, Republic of Liberia v. Imperial Bank*, 9 L. R. Chy. 569; *Dunn v. McLean*, 6 Pr. R. 156; *Bolton v. Foster*, 7 Pr. R. 388; *Vardon v. Vardon*, *Id.* 736.)

Second Examination.—As to the circumstances under which a second examination may be had. (See *Dobson v. Dobson*, 7 Pr. R. 256.)

2. EXAMINATION OF PARTIES FOR DISCOVERY, IN THE QUEEN'S BENCH, AND COMMON PLEAS, DIVISIONS.

The practice in these Divisions will continue to be governed by the *R. S. O. c.* 50, ss. 156. *et seq.*, save as varied by the *Rules*. The parties entitled to examine, and be examined, appear to be the same in all the Divisions of the High Court. The only difference is, as to the mode, and time, of obtaining the examination, and perhaps, also as to the consequences of default, and the reader is therefore referred to what has been already said as to the procedure in the Chancery Division.

(e) *When it may be had.*

When Examination may be had.—The *R. S. O.* 50, s. 156, provides that the examination may be had after an action is “at issue;” this expression, it is presumed, will be held to mean, as soon as the pleadings are closed under the new practice. (See *ante* p. 86). It will be seen the time for obtaining the examination, is the same for both plaintiff, and defendant. It would seem, however, in order to entitle either plaintiff, or defendant, to examine his adversary in an action in the Queen’s Bench, or Common Pleas, Divisions, that there must be, a defence put in, or damages for an unliquidated amount to be assessed, or there can be no “issue;” thus where the cause was referred to arbitration it was held the examination could not be had. (*Manufacturers and Merchants Insurance Co. v. Attwood*, 7 Pr. R. 13.) An order, however, was made in favour of the plaintiff in an action for seduction, after an interlocutory judgment was entered against the defendant. (*Cerriby v. Wells*, 7 Pr. R. 330). In the Chancery Division, the examination may be had by the plaintiff, when the time for putting in the defence has expired, though no defence has been put in.

(f) *How obtained.*

How obtained.—The party desiring to make the examination is required to file the affidavit of himself or his solicitor or agent, stating that the deponent believes, that the party proposing to examine, will derive material benefit in the action, or other proceeding, from such examination, that there is a good cause of action, or of defence, upon the merits, and if the application is made on the part of the defendant, that the examination is not sought for the purpose of delay. (*R. S. O.* c. 50, s. 158). If the examination is to take place before a *Deputy Clerk of the Crown*, *Special Examiner*, or *Local Master*, on filing this affidavit with the officer he will issue an appointment without an order. (*Ib.* s. 159). If the examination is required to be taken before any other officer, an order of course,

must be obtained; where the solicitors for both parties reside in the same county, the Judge of the County Court of that county, may grant the order *ex parte*, otherwise (except as far as the *Rules* extend the jurisdiction of the County Judge or *Local Master*, so as to enable them to make the order), the application must be made to the *Master in Chambers*. An order for the examination of a party resident beyond the jurisdiction may be made, but only on notice. (*Morell v. Morrison*, 6 Pr. R. 210; *Dewart v. Hughitt*, 7 Pr. R. 323.)

An order for the re-examination of a party who has been once examined, will not be granted except on special circumstances. (*Laird v. Stanley*, 6 Pr. R. 322; *Clark v. Allen*, 43 U. C. Q. B. 242; *Thorburn v. Brown*, 8 Pr. R. 114); and an order to examine obtained before trial, can not be acted on after trial. (*Shelly v. Hussey*, 8 Pr. R. 250.)

How attendance of Party procured.—A copy of the appointment and of the order, where one is necessary, (see *supra*), must be served on the party required to be examined forty-eight hours before the hour appointed for the examination; and he must be paid the proper charges for conduct money. (*R. S. O. c. 50*, s. 160). If he is required to produce any books, papers, or documents, notice to produce must also be served on him, specifying with reasonable certainty the documents required. (See *Ib.*, s. 161.)

Consequence of non-attendance, &c.—Any party refusing to attend, or refusing to be sworn, or to answer lawful questions, is liable to be punished for contempt. (*R. S. O. c. 50*, s. 162.) In *MacLennan's Judicature Act*, p. 229, the learned author suggests that the consequences of default, will probably be held to be the same in all the Divisions, according to the former practice in Chancery; but this seems open to doubt, as there does not appear to be any express provision in the Act or *Rules*, making the former practice in Chancery, on this point, applicable to all the Divisions.

3. COSTS OF EXAMINATION FOR DISCOVERY.

Costs of Examination for Discovery.—The costs of an examination for discovery in all the Divisions, are costs in the cause, but the Court, or Judge, in adjusting the costs of the action may, at the instance of either party, direct enquiry to be made as to the propriety of making such examination, or the taxing officer may make the enquiry without any direction, and if it appears to have been unreasonable, vexatious, or at unnecessary length, the costs occasioned by the examination are to be borne in whole, or in part, by the party in fault. (*Rule 220*, and see *Woodman v. Blair*, 8 Pr. R. 179.) Under the former practice at law, the costs were in the discretion of the Judge who made the order, (*R. S. O. c. 50, s. 167*), and hence the provisions of the Statute enabling an examination to be taken without an order, (see *R. S. O. c. 50, s. 159*), became practically a dead letter.

4. EXAMINATION MAY BE USED IN EVIDENCE.

Examination may be used in Evidence.—The examination, or any part of it, may be used in evidence at the trial of the action, and if a part only is used, the Judge may look at the rest of it, and if he thinks that any other part is so connected with the part proposed to be used, that the one ought not to be used without the other, he may direct such other part to be put in evidence also. (*Rule 239*.) The examination, however, is only evidence in the way that an admission is evidence, and can only be used against the party whose examination it is. In the case of the examination of officers of a corporation, the examination would not be evidence against the corporation, but the officers examined, would have to be called as witnesses.

The depositions are to be filed in the office where the pleadings in the action are filed.

5. PRODUCTION OF DOCUMENTS.

We now proceed to consider the other branch of the procedure for discovery, viz., that obtained by the produc-

tion of documents in the possession of the adverse party. As has been already observed, the practice, as far as regards this branch of the subject, is the same in all the Divisions of the High Court.

Production and inspection of documents may now be obtained in an action in three ways.

1. By an order of course.
2. By special order, which may be made, for cause, at any stage of the proceedings.
3. By serving a notice to produce documents which are referred to in the pleadings, or affidavits, of any party, which, if not complied with, may, in certain cases, be followed up by an application for a special order to produce.

We will consider these three methods of obtaining production in the order in which we have mentioned them.

(a) *Production under Order of course.*

How Production obtained.—Production of documents in the possession of the adverse party, may be obtained by issuing, and serving, an order, which may in certain cases be obtained *ex parte* on *præcipe*, requiring him, within ten days after service, to make discovery under oath of the documents in his possession, and also to produce and deposit the same with the proper officer. (*Rule 222.*) The form of order given in the *Rules, Form No. 125*, is inappropriate. It makes no provision for depositing the documents, and it purports to be made by a Judge, or the *Master in Chambers*, or some officer entitled to exercise the jurisdiction of the *Master in Chambers*, whereas the *Rule* says it may be obtained on *præcipe*. Hitherto in Chancery, orders of this kind were issued on a *præcipe* therefor being filed with the officer with whom the bill was filed, and it would seem probable that this practice is intended to be followed, notwithstanding the form of the order, and that therefore the order may now be issued by

the officer with whom the pleadings are filed. The order should be issued in the form formerly used in Chancery in like cases. (See *Leggo's Forms*, 2nd ed., No. 534.)

(b) *When Order obtainable.*

By Plaintiff.—The plaintiff may obtain the order as soon as the time for defendant to put in his defence has expired. (*Rule 222*.) The order may be made against all defendants who, at the time of the application for the order, have delivered their defence, or who are in default, but it cannot be made as against others who have not put in a defence, and whose time for doing so, has not then expired.

By Defendant.—The order may be obtained by the defendant as soon as the pleadings are closed. (*Rule 222*.) But it does not seem probable that it was intended to extend the right to issue such an order to defendants who have put in no defence, except, perhaps, in cases where there are damages to be assessed, (*Pape v. Lister*, 5 L. R. Q. B. 642); though, certainly, the *Rule* seems wide enough to cover all cases, whether there be any defence, or not. Under an order obtained by one defendant, other defendants have no right to compel production, or inspection. (*Seymour v. Longworth*, 3 Chy. Ch. R. 112).

Service of Order.—The order may be served on the solicitor of the party required to produce, or on any party suing, or defending, in person, in the same way as a pleading. (*Rule 237*, and see *ante* p. 92.) A solicitor served with such an order, and neglecting, without reasonable excuse, to give notice thereof to his client, is liable to an attachment. (*Rule 238*.)

(c) *Affidavit on Production.*

Affidavit on Production.—The affidavit on production, in obedience to the order, must be made by the party required to produce, or in the case of a corporation aggregate, by some one of its officers, (*Rule 225*); or in the case of a

foreign government, by one, or more, of the ministers, or officers, of the government. (*Republic of Liberia v. Imperial Bank*, 16 L. R. Eq. 179.) A next friend cannot be ordered to make the affidavit; neither can the husband of a married woman. (*Brown v. Capron*, 6 Pr. R. 203; *Danl. Pr.*, 5th ed., 1682.) But where the person under disability who is ordered to produce, is unable to make affidavit, the affidavit of the next friend may be accepted. (*Traviss v. Bell*, 1 C. L. J., 3rd S., 276.) For form of affidavit, see *Forms* Nos. 34, 35.

The affidavit must be made, although there are no documents to be produced.

The affidavit must not be sworn, before the date of the order to produce. (*Kennedy v. Royal Ins. Co.*, 3 Chy. Ch. R. 489; and see *Dunn v. McLean*, 6 Pr. R. 156; *Dobson v. Dobson*, 7 Pr. R. 258.)

The party making the affidavit must, if necessary, apply to his present, or former, agents, for the necessary information to enable him to make it. (*Earl of Glengall v. Fraser*, 2 Hare, 99; *McIntosh v. Great Western R. W. Co.*, 4 DeG. & Sm. 544; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; 35 L. T. 76.)

(d) *What Documents to be produced.*

Documents to be produced.—It will be seen, from the form of the affidavit, that the deponent is required to make a complete disclosure of all documents in his possession, or power, at the time of making his affidavit, and also of those which have been at any previous time in his possession, and, in case any have ceased to be in his possession, he is required to state, when they were last in his possession, and what has become of them. If he objects to produce any of the documents, he must state the facts on which the objection is founded. (*Gardner v. Irvine*, 4 Ex. D. 49, 40 L. T. 357; *Webb v. East*, 5 Ex. D. 23.) Every material document must be produced, unless it is shown to be privileged. Where privilege is claimed, it is sufficient to

describe the documents in the affidavit, so as to enable the Court, if it calls for their production, to identify them with those mentioned in the affidavit; thus, when documents were described as "numbered from 50 to 76 inclusive, tied up in a bundle marked with the letter A, and initialed by me," the description was held sufficient. (*Taylor v. Batten*, 4 Q. B. D. 85, 39 L. T. 408.) The documents are to be deposited in the office named in the order, (*Rule 222*); but the deposit of books in constant use may be dispensed with by the Court, or a Judge, on an undertaking to allow inspection. (*Re Ross*, 5 App. R. 82.)

(c) *Documents which need not be produced.*

Documents privileged.—It would be beyond the scope of this work to attempt anything but a brief survey of some of the cases bearing on this important subject. It may be useful, however, to refer to a few of the principles upon which documents have been held privileged from production under the common order to produce, *e. g.*, the following classes of documents have been held privileged:—

1. State documents, or documents of a like character, the publication of which is not in the public interest. (*MacLennan*, 238.)

2. Title deeds of land, of which a party defendant is in possession, but an affidavit must be made of them by such defendant, (*Ib.*) and see (*Phillips v. Phillips*, 4 Q. B. D. 127, 40 L. T. 815).

3. Opinions of counsel, or solicitors, and other communications relating to the title of land passing between the party, or his predecessors in title and their respective legal advisers, whether before, or after, action is brought. (*Minet v. Morgan*, 8 L. R. Chy. 361, *Corporation of Hastings v. Ivall*, *Ib.* 1017, *Hamelyn v. Whyte*, 6 Pr. R. 143.) So also all communications between the party and his solicitor relating to the action in which production is sought.

Letters, reports, and communications coming from any agent employed by the solicitor, or at his instance, or in any other way procured by, or for the information of, the solicitor, with a view to a litigation commenced, or threatened. (*Wheeler v. Le Marchant*, Law Times, April 1881, p. 425, *Southwark and Vauxhall Water Co. v. Quick*, 2 Q. B. D. 315, 38 L. T. 28; *McCormac v. Bell*, 1 C. P. D. 471, *Friend v. London, Chatham, and Dover R. W. Co.*, 2 Ex. D. 437, 36 L. T. 729.) But statements in writing, made voluntarily, or at the party's request, for his own information, by his unprofessional agents, either before, or after, litigation, are not privileged. (*Bustros v. White*, 1 Q. B. D. 43, 34 L. T. 835; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 35 L. T. 76.)

5. Documents having no bearing on the issue, or relating exclusively to the party's own title, or to the evidence by which his case is to be established. (*MacLennan*, 238.)

6. Mortgage deeds, until mortgage is paid, (*Ib.*, and see *Bell v. Chamberlain*, 3 Ch. R. 429, but see *Emmens v. Middlemiss*, 8 Pr. R. 320.)

7. Documents, the production of which would tend to involve the party in a criminal prosecution, or subject him to a penalty, or forfeiture. But the penalty and forfeiture clauses of 13 Eliz. c. 5, and 27 Eliz. c. 4, cannot be used to prevent production of deeds sought to be impeached under those statutes. (*MacLennan*, 239.)

8. Documents in the joint possession of the party required to produce, and some third party not a party to the suit, (*Kettlewell v. Barstow*, 7 L. R. Chy. 686), unless the party required to produce sufficiently represents such third person, (see *Fraser v. Home Ins. Co.*, 6 Pr. R. 45.) but in such a case the party required to produce, must give all the information in his power, as to the contents of the documents, though he may be excused from actually producing them. (*Clinch v. Financial Corporation*, 2 L. R. Eq. 271.)

9. Documents which, though relating to the matters in question, are not material to the question to be tried at the hearing. (*Merchants Bank v. Tisdale*, 6 Pr. R. 51; *Bryce v. McIntyre*, 7 Pr. R. 134, but see *Western Canada Oil Co. v. Walker*, 6 Pr. R. 191.)

10. Documents held by a party in a different character from that in which he is sued, (*Pindar v. Smith*, 6 Madd. 38, but see *Wagner v. Mason*, 6 Pr. R. 187.)

(f) *Cross-examination.*

Cross-examination on Affidavit.—Under the former practice in Chancery, in Ontario, the deponent was liable to cross-examination on his affidavit, (*Campbell v. McArthur*, 7 Pr. R. 46,) although the contrary appears to have been the rule in England, (*Manby v. Bewicke*, 8 D. G. M. & G. 470.)

Rule 226 expressly provides that an officer of a corporation making an affidavit on production is liable to cross-examination thereon, and it would seem that the deponents in all such affidavits, are liable to cross-examination in actions in the Chancery Division, without an order, but whether such cross-examination can be had in actions in the other Divisions, without an order, seems open to some doubt. (See *Rule 285*.)

(y) *Consequence of Non-production.*

Consequences of Non-production.—If any party fails to comply with an order for discovery, or inspection, of documents, he is liable to attachment, (*Rule 236*.) unless he can show that he had no notice of it, (*Rule 237*); but a solicitor not notifying his client, is himself liable to be attached. (*Rule 238*.) A plaintiff is also liable to have his action dismissed; and a defendant, to have his defence struck out, and the plaintiff placed in the same position as if he had not defended. (*Rule 236*.)

Where, however, an affidavit has been filed, in answer to an order, to produce documents, if the party obtaining the order considers it defective, for any reason, or insists that

documents admitted to be in the possession of the deponent, but which are not produced, are not sufficiently shown to be privileged, or that he has other documents which he has not accounted for, he should not move to commit the deponent, but should move to compel him to file a better affidavit. (*Ross v. Robertson*, 2 Chy. Ch. R. 66.) On a motion to compel the filing of a better affidavit, on the ground that other documents than those mentioned in the affidavit are in the deponent's possession, it must appear either by the admission of the deponent, or his solicitor, that such other documents are in the deponent's possession, or that upon any admissions or allegations in the pleadings this may reasonably be inferred to be so, such admissions may be proved by admissions in the pleadings, or in any other affidavits made by the deponent making production, or by the production of his cross-examination on his affidavit on production, or by the affidavit of a third party, where the latter is not denied. (*Campbell v. McArthur*, 7 Pr. R. 46.)

When no affidavit at all is filed, a motion to commit the defaulting party may be made. The application must be made on notice, and the notice of motion, or summons must be served on the defaulting party personally. (See *Rules* 364, 365, *Paterson v. Bowes*, 4 Chy. Ch. R. 44.)

6. PRODUCTION UNDER SPECIAL ORDER.

Production under Special Order.—The Court, or a Judge, may at any time during the pendency of an action, or proceeding, make a special order for production by any party thereto, upon oath, of such of the documents in his possession, or power, relating to any matter in question in such action, or proceeding, as the Court, or Judge, shall think right, and may deal with such documents, when produced, as shall appear just. (*Rule* 221.) The application for such an order must ordinarily be supported by an affidavit, and it would seem that it should be similar in effect to that required upon an application for inspection of documents not referred to in any pleading or affidavit. See *post*, p. 245.

7. PRODUCTION ON NOTICE.

Production, and Inspection, on Notice.—In addition to, or instead of, the procedure above referred to, every party to an action, or other proceeding, is, at any time before, or at the hearing thereof, entitled to give notice in writing (see *Form No. 23*) to any other party in whose pleading, or affidavits, reference is made to any document, to produce such document for the inspection of the party giving such notice, or his solicitor, and permit him to take copies thereof, and any party failing to comply with such a notice, is precluded from afterwards using such document in evidence, unless he satisfies the Court that it relates only to his own title (he being the defendant to the the action) or that he had some other sufficient cause for not complying with such notice. (*Rule 229*.) But where a defendant, before filing his defence, gave the plaintiff notice to produce one of the plaintiff's principal title deeds referred to in his statement of claim, and the plaintiff refused to comply with such notice, and afterwards gave the deed in evidence at the trial, the Court refused to exclude it, holding, that the defendant ought to have applied to the Court to compel its production before the trial. (*Webster v. Whewall*, 15 Ch. D. 121, see *Rule 233*.)

Rule 229 appears to authorize the notice to produce for inspection, to be given by a defendant to his co-defendant, and where a defendant has filed a counter-claim against the plaintiff, and a co-defendant, no doubt the notice may be given to, or by, such co-defendant as well as the plaintiff: but it may be, that the words "any other party," may be construed judicially to mean "any other adverse party." If the *Rule* enables defendants, as between whom no counter-claim, or set-off, is filed, to obtain discovery from each other, it extends the right of discovery a step beyond its former limits, in equity.

How Notice to be complied with.—The party served with such notice within two days after its receipt, if the documents

have been set forth by him in an affidavit filed in answer to an order to produce, and if not, then within four days after the receipt of the notice, is to deliver to the party giving the same, a notice stating a time within three days from the delivery thereof, at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which, if any, he objects to produce, and on what ground. (*Rule 232.*) For form of this notice, see *Form No. 25.*

Consequence of Refusal to allow Inspection.—If no notice of a time for inspection is served, as above-mentioned, or if the opposite party objects to give inspection then, in either event, the party requiring inspection may apply to a Judge for an order for inspection. (*Rule 233.*) The *Rule* expressly provides that every such application "is to be to a Judge," but it is probably not intended to exclude such applications from the jurisdiction of the *Master in Chambers.*

In any case where the discovery or inspection of documents is objected to, if the right thereto depends on the determination of any question, the Judge before deciding on the right to the discovery, or inspection, may order the question to be first determined. (*Rule 235.*)

Except where the documents of which inspection is sought, are referred to in the pleadings, or affidavits, of the party against whom the application is made or disclosed in his affidavit of documents (*i. e.* the affidavit filed in answer to an order to produce)—the application must be supported by an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. (*Rule 234.*)

Costs.—Costs of orders, and notices, for production, or inspection, of documents, or of inspecting same, are not to be allowed, unless it is shown to the satisfaction of the taxing officer, that there were good and sufficient reasons

for taking such order, giving such notice, or making such inspection. (*Rule 230.*) Under the former practice in Chancery, costs of procuring, and making, production, under an order of course, were, *prima facie*, costs in the cause, and it is to be presumed that, although there is no express rule to that effect, as there is in the case of the costs of the examination of parties, (see *Rule 220,*) such costs will be costs in the cause in all the Divisions subject to the above-mentioned provision, as to their disallowance when unreasonably incurred.

CHAPTER XX.

AMENDMENT OF WRITS, PLEADINGS, AND OTHER PROCEEDINGS.

1. *Amendment of Proceedings generally, under Order.*
 - (a) *Amendment of Writ of Summons, and Indorsement.*
 - (b) *Amendment of Pleadings under Order.*
 - (c) *Adding, or striking out, Parties.*
2. *Amendment of Pleadings, by Consent.*
3. *Amendment of Pleadings, without Leave.*
4. *Amendments, how made.*
5. *Amendment of Judgments, and Orders.*

1. AMENDMENT OF PROCEEDINGS GENERALLY, UNDER ORDER.

The most extensive powers are given to the Court to amend all kinds of proceedings, so as to secure the advancement of justice, and effectuate the rights of parties.

While ordinarily, amendments of proceedings can only be made by leave of the Court, on application made for that purpose, yet in the case of pleadings, the former practice in Chancery of allowing amendments to be made, as of course, has been adopted, with the variation, that where a party is entitled to amend without leave, he may do so, without taking out, or serving, any order.

In what cases amendments may be made, and the mode of making them, we shall now proceed to consider.

The Court, or a Judge, may at any time, and on such terms as to costs or otherwise, amend any defect, or error, in *any*

proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question, or issue, raised by, or depending on, the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case. (*Rule 474*, and see *Peterkin v. McFarlane*, 4 App. R. 45, *R. S. O. c. 49*, s. 8.)

(a) Amendment of Writ of Summons, and Indorsement.

Writ of Summons, and Indorsement.—The writ of summons may, by leave, of the Court, or a Judge, be amended at any stage of the proceedings, on such terms as may seem just. (*Rule 10.*)

The indorsement may also be amended by leave of the Court, or a Judge, so as to extend it to any other cause of action, or additional remedy, or relief. (*Rule 11.*)

(b) Amendment of Pleadings under Order.

Pleadings, generally, under Order.—The Court, or a Judge, at any stage of the proceedings, may allow either party, to alter his statement of claim, or defence, or reply; or may order to be struck out, or amended, any matter in such statements respectively, which is scandalous, or tends to prejudice, or embarrass, or delay, the fair trial of the action; and all such amendments are to be made as may be necessary for the purpose of determining the real question in controversy between the parties. (*Rule 178*, *Peterkin v. McFarlane*, 4 App. R. 45; *R. S. O. c. 49*, s. 8.)

(c) Adding, or striking out, Parties.

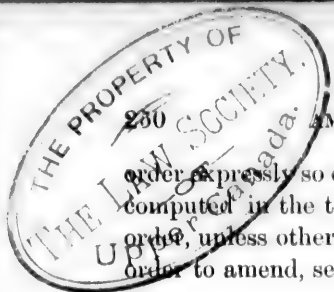
Parties—Adding or striking out.—The Court, or a Judge, may at any stage of the proceedings, either upon, or without, the application of either party, and on such terms as may appear just, order the name of any party, plaintiff, or defendant, to be struck out, or the name of any person who ought to have been a party, to be added. (*Rules 103 a, 104.*) But no person can be added as a plaintiff suing without a

next friend, nor as the next friend of a plaintiff under disability, without his consent. (*Rule 103 b.*) Parties added as defendants are to be served, unless otherwise ordered, with an amended writ of summons, to be sued out by the plaintiff, in which they are to be named as defendants, (*Rule 103 c, 105*), together with an amended statement of claim, if any, have been previously delivered, or else the statement of claim is to be served on such new defendant, within four days after his appearance. (*Rule 106.*)

Where an action has been *bond fide* instituted in the name of the wrong person as plaintiff, the right person may be ordered to be substituted, or added as plaintiff. (*Rule 90.*)

Applications to amend.—Applications may be made to the Court, or a Judge, or to the *Master in Chambers*, in Chambers, or to any officer authorized to exercise the jurisdiction of the *Master in Chambers*, or at the trial. (*Rules 156, 178, 184, 474.*) Ordinarily applications of this kind should be made in Chambers. They must usually be made on notice to the opposite party, and supported by affidavit. The payment of costs is generally made a condition of allowing an amendment, and if imposed, it is a condition precedent to the right to amend.

When Amendments to be made under Order.—When an order to amend a pleading is granted, the amendment must be made within the time, if any, named in the order, and if no time be named, then within fourteen days from the date of the order. But the time may be enlarged by written consent. (*Rule 458.*) If the amendments are not made within that time, and there be no written consent enlarging the time, the order to amend can no longer be acted on. (*Rule 185.*) This *Rule*, however, only applies to the amendment of pleadings; other proceedings may be amended at any time, unless the order expressly limits the time for making the amendment. Pleadings cannot be amended in the long vacation, except by consent, unless the



order expressly so directs, and the long vacation is not to be computed in the time for making an amendment under an order, unless otherwise ordered. (*Rule 460.*) For form of order to amend, see *Form No. 119.*

2. AMENDMENT OF PLEADINGS, BY CONSENT.

Either party may amend his pleading at any time without order, on filing the written consent of the opposite party, or his solicitor. (*Rule 183.*) The consent, unless in general terms to amend as the party may please, should distinctly specify the amendments to be made. The time allowed for amending on *præcipe* may be extended by consent in writing. (*Rule 458.*)

3. AMENDMENT OF PLEADINGS, WITHOUT LEAVE.

Statement of Claim.—A plaintiff may amend his statement of claim without leave, before the expiration of the time for reply, and before replying; or, if no defence delivered, within four weeks from the appearance of the defendant who shall have last appeared. (*Rule 179.*) except during the pendency of a demurrer; (*Rule 196.*) and during the long vacation when no amendment can be made except by consent, or under order. (*Rule 460.*) Defences arising to any set-off, or counter-claim, after its delivery, may be introduced, by amendment, into the statement of claim, within three weeks after the defence, or last of the defences, shall have been delivered. (*Rule 152.*) The statement of claim may be amended without order at any time by a written consent. (*Rule 183.*) The time for making any amendment, may be enlarged by written consent. (*Rule 458.*) But no pleading in respect of which a demurrer has been filed, can be amended, pending the demurrer, without leave, (*Rule 196.*) except by consent.

Set-off, or Counter-Claim.—A defendant who has set up in his defence, any set-off, or counter-claim, may, without leave, amend such set-off, or counter-claim, before the time allowed him for pleading to the reply, and before pleading

thereto, or in case there be no reply, within twenty-eight days from the filing of his defence; (*Rule 180*.) except during the pendency of a demurrer; (*Rule 196*.) and except during the long vacation, when the amendment can only be made by consent, or under order. (*Rule 460*.) The right to amend under *Rule 180*, only applies to defences by way of counter-claim, and set-off; not to any other statement of defence; but amendments may be made at any time to any statement of defence whatever, by a written consent. (*Rule 183*.) And the time for making any amendment in any pleading may also be enlarged by written consent. (*Rule 458*.)

Statement of Defence.—Defences arising after the delivery of a statement of defence, may be introduced by amendment into the statement of defence, within eight days after the ground of defence has arisen, on filing an affidavit that the matter of the amendment arose within eight days next before the day of making the amendment. (*Rule 153, 155*.) But no pleading in respect of which a demurrer has been filed, can be amended pending the demurrer without leave. (*Rule 96*.) No other amendments can be made in a statement of defence (not being a set-off, or counter-claim,) without either an order, or consent.

Amendments, consequent on Amendments by opposite party.—Where a plaintiff amends his statement of claim, or a defendant his counter-claim, under *Rules 179, 180*, the opposite party may within four days after the delivery of the pleading so amended, amend his former pleading without leave; or he may apply for further time to amend (*Rule 182*.)

Long Vacation.—The long vacation is not in any case counted, in reckoning the time allowed for amending without leave. (*Rule 461*.)

4. AMENDMENTS, HOW MADE.

Amendments, how made.—Amendments may be made by written alterations, and by additions on paper to be inter-

leaved, unless the amendments require the insertion of more than 200 words in any one place, or are so numerous, or are of such a nature, as that the making of them in the copies filed, would render the same difficult, or inconvenient, to read, in either of which cases, a fresh copy of the pleading as amended must be filed. (*Rule 186.*) Any written amendments, are to be written in different coloured ink from that used in the original pleading. (*Rule 187.*) The pleading is to be marked "amended," with the date of amendment. (*Ib.*) When the amendment is one that can be made without leave, it is probable that the party making the amendment will be required to file a *præcipe* to amend. In other cases, the order or consent, allowing the amendment must also be produced. After the time allowed for amendment has elapsed, no amendment can be made without a further order, or a written consent. (See *Rules 183, 458.*) No amendment can be made during the long vacation, except by express order, or by consent. (*Rules 458, 460.*)

Service of amended Pleading.—The amended pleading is to be served within the time allowed for amending it. (*Rule 188.*) Under the former practice, in Chancery a convenient practice prevailed of demanding the opposite party's office copy of a bill for the purpose of amending it; by this means the expense was saved of serving an entirely new copy, on making amendments.

Disallowance of Amendments.—When amendments are made in a statement of claim, or counter-claim, under *Rules 179 and 180*, the opposite party within eight days after service of the amended pleading may apply in Chambers to disallow the amendments, and such order may be made as may seem just. (*Rule 181.*)

5. AMENDMENT OF JUDGMENTS, AND ORDERS.

Amendment of Judgments, and Orders.—Clerical mistakes, or errors, arising from accidental slip, or omission, may be corrected on motion, without appeal. (*Rule 338.*) The motion to amend must in general be made on notice,

(*Radenhurst v. Reynolds*, 11 Chy. 521,) and if anything but the judgment delivered, and the judgment drawn up, has to be looked at, the motion should be made in Court. (*Lapp v. Lapp*, 3 Chy. Ch. R. 234.)

Under the former practice in Chancery, when any order, as drawn up, required amendment in any particular on which the Court did not adjudicate, it might be amended in open Court, on petition, without a rehearing, or appeal, if the Court thought fit, (see *Chy. O.* 336), and it is presumed that orders may, under like circumstances, be still amended in this way.

CHAPTER XXI.

PROCEEDINGS CONSEQUENT UPON MARRIAGE, DEATH, OR
TRANSMISSION OF INTEREST, OF PARTIES TO ACTIONS.1. *Proceedings necessary upon Marriage, Death, or
Transmission of Interest.*(a) *Marriage of Female Party.*(b) *Death of Parties.*(c) *Bankruptcy of Parties.*(d) *Assignment pendente lite.*2. *Who may obtain Order to continue Proceedings.*(a) *How Order obtained.*(b) *Service of Order.*3. *Discharging Order.*1. PROCEEDINGS NECESSARY UPON MARRIAGE, DEATH, OR
TRANSMISSION OF INTEREST.

Under the former practice at law and in equity, actions and suits frequently became abated, or defective, by reason of the death of parties, or by the marriage of female parties, or by reason of the interest of some of the parties being transferred by them to, or vested by, operation of law in, some third person, a different method prevailed at law and in equity for remedying such abatements, or defects. (See *R. S. O. c. 50, ss. 228, et seq., Chy. O. 337-51.*)

Under the new procedure, the former practice in Chancery in this respect, is in the main adopted.

We have already seen that where any of the parties to an action entitled, or liable, to execution, die, no execution can issue until leave has first been obtained on application for that purpose. (*Rule 356, see ante p. 151.*)

But in all other cases where, in the progress of an action, it is necessary, in consequence of the death, or marriage of, or assignment, or transfer by, any of the parties to an action, to bring any persons, not already parties, before the Court, it is to be accomplished in a way similar to the former practice in Chancery.

Proceedings taken during the abatement of the suit were formerly void, but might, in certain cases, by consent of all parties, be adopted and confirmed by the order of the Court after the cause had been duly revived. (*Houston v. Briscoe*, 7 W. R. 394; *Smith v. Horsfull*, 24 Beav. 331; *Graham v. Davis*, 2 Chy. Ch. R. 187.)

Under the new procedure, the rules which formerly prevailed in Chancery will, no doubt, regulate the practice to be pursued in obtaining orders to continue proceedings, in the event of the marriage, death, bankruptcy, or transmission of interest, of any party to an action, rendering it necessary that any person not already a party to the action, should be made a party thereto.

Where the cause of action survives to persons already before the Court, (*Eldridge v. Burgess*, 7 Chy. D. 411,) the action is not abated by reason of the marriage, death, or bankruptcy, of any of the parties, and is not defective by the assignment, creation, or devolution of any estate or title *pendente lite*. (Rule 383.) And in case of an assignment, creation, or devolution of any estate, or title, *pendente lite*, the action may be continued by, or against, the person to, or upon, whom such estate or title has come or devolved. (Rule 384.) No change is made in the law as to the causes of action which do, and do not, survive.

(a) *Marriage of Female Party.*

Marriage of Female Party.—If the action is one which could, notwithstanding the marriage of the party marrying, be carried on by, or against, her without joining her husband as a defendant, and without naming a next friend,

no order is necessary. If, however, the cause of action is such that it is necessary that, if a plaintiff, she should sue by next friend, or if a defendant, that her husband should be joined, then an order is necessary to be issued,—in the case of a plaintiff, enabling her to continue the action by her next friend against the original defendants and her husband as a defendant,—and in the case of a female defendant marrying, enabling the plaintiff to continue the action, against the original defendant and her husband as a co-defendant. Under the former practice in Chancery where a woman married without causing any abatement in the suit, it was sufficient for the parties to note the change of name in the style of the cause by adding after the name of the party so marrying, the words “now A. B.,” giving the name acquired by her marriage. This change was made in the style of the cause, without any order.

(a) *Death of Parties.*

Death of Plaintiff.—The death of a sole plaintiff renders it necessary, where the cause of action survives, that an order should be obtained to continue the action, by the persons on whom the estate, or interest, of the deceased plaintiff, in the subject matter of the litigation, has devolved.

On the death of one of several plaintiffs, if his interest passes to his co-plaintiffs, or to a defendant, no order is necessary, unless the interest of the deceased plaintiff becomes so vested in a surviving plaintiff, or defendant, in a different capacity to that in which the action was commenced by, or against, him. Neither is any order necessary, where the deceased plaintiff is one of several representing a class. (*Hind v. Morton*, 2 H. & M. 368.)

Under the former practice in Chancery, where one of several plaintiffs died *pendente lite*, without causing an abatement in the suit, it was customary to retain the name of the deceased plaintiff in the style of the cause, but to write after it, in all subsequent proceedings, the words

"since deceased." This was done without order. This will now probably be the practice in all the Divisions of the High Court.

Death of Defendant.—The death of a sole defendant renders it necessary, wherever his liability in respect of the cause of action survives, or his interest in the subject matter of the litigation, passes to his real, or personal, representatives, that the person liable to be charged, or in whom the estate, or interest, of the deceased defendant has become vested, should be added as a defendant. When one of several defendants dies, it is not necessary to issue any order if his interest passes to his surviving co-defendants, or any of them, unless the right becomes so vested in any such surviving defendant, in another right to that in which he is made defendant, *e. g.*, if the right becomes vested in a defendant as executor of a deceased defendant, an order would be necessary to continue the suit against such surviving defendant in his capacity of executor, as well as in respect of his individual liability, or interest. Under the former practice in Chancery, where a defendant died, without causing an abatement of the suit; his name was retained in the style of the cause, but the words "since deceased," were added thereafter, in all subsequent proceedings. This was done without any order. This will probably be now the practice in all the Divisions of the High Court.

(c) *Bankruptcy of Parties.*

Bankruptcy.—Owing to the repeal of the Canadian Insolvent Act, it is unnecessary to dwell at any length on the effect of bankruptcy on a pending action, which in general depends to some extent on the particular wording of the Act regulating proceedings in Insolvency.

(d) *Assignment pendente lite.*

Assignment of Interest.—Wherever the legal estate or interest in the subject matter of the litigation was transferred *pendente lite* by either plaintiff or defendant, it was

generally necessary according to the former practice in Chancery that the transferee should be added as a party. And wherever a plaintiff assigned his interest to any third person not a party to the suit, it was generally necessary that the assignee should be made a plaintiff, either alone, or jointly with the original plaintiff. Where however the title or interest transferred by a defendant *pendente lite*, was merely an equitable estate, or interest; it was generally unnecessary to bring the transferee before the Court, but he was bound by the proceedings as though he were a party thereto. In such a case, if the transferee desired to be made a party he himself must have applied on petition to be let in, and it is presumed that this will be now the rule in all the Divisions of the High Court. Thus where a bill was filed by a first mortgagee for foreclosure, and before service of the bill the mortgagor made a second mortgage, and the second mortgagee was not made a party to the suit. it was held, nevertheless, that he was concluded by the foreclosure, and a subsequent suit by him to redeem was dismissed. (*Robson v. Argue*, 25 Chy. 407.)

No order to continue the proceedings is necessary where the estate, or interest, or liability, of one party, is assigned to, devolves upon, or passes to, any other party to the action *pendente lite* in the same character in which he is already a party. (*Rule 383.*) But if the estate, or interest, is acquired, or the liability devolves upon such other party in another capacity to that in which he sues, or is sued, *e.g.*, if he sues, or is sued, in his individual capacity, and the estate, or liability, devolves upon him as executor, administrator, or trustee, an order to continue the proceedings against him both individually, and as executor, &c., would seem to a necessary.

An order to continue the proceedings must be obtained wherever any additional parties are required to be added in consequence of any assignment *pendente lite*. (*Matthews v. Mears*, 21 Chy. 99.)

2. WHO MAY OBTAIN ORDER TO CONTINUE PROCEEDINGS.

By whom Order may be obtained.—An order can only be properly obtained, where the change of interest takes place *pendente lite*; parties who acquired their interest before the action was commenced cannot be added by such an order, (*McKenzie v. McDonnell*, 15 Chy. 442,) and where a sole defendant died after a bill was filed, but before its service, it was held that the suit could not be revived. (*Watson v. Ham*, 1 Chy. Ch. R. 295.) Formerly, when the abatement of the suit took place before decree, the order to revive could only be obtained by the plaintiff, but the defendant might, in such case, move that the plaintiff, or his representative be ordered to revive within a time to be limited, and in default that the suit be dismissed. (See *Cameron v. Eager*, 6 Pr. R. 117.) This will probably still be the rule before judgment, except perhaps in cases where a defendant files a counter claim, and in such cases the defendant will probably be deemed to have the same right to obtain an order to continue the action, as though he were a plaintiff.

Formerly, where a suit in equity abated after decree, any defendant who had an interest therein might revive the suit in the event of the plaintiff neglecting to do so; but where a defendant obtained an order of course to revive, he was not entitled to the conduct of the suit. If he desired to obtain that, a motion on notice was necessary. (*Noble v. Stow*, 30 Beav. 512.)

A creditor who had proved a claim in a creditor's suit, though not a party, was also entitled to revive, even though there were no report allowing his claim. (*Inchley v. Allsop*, 9 W. R. 649.) But where it becomes necessary to enforce a judgment against persons who, subsequent to the judgment, have acquired a title, such persons cannot be added as parties in the suit in which the judgment is obtained, but a new action must be brought. *Attorney-General v. Corporation of Birmingham*, 15 Ch. D. 423.)

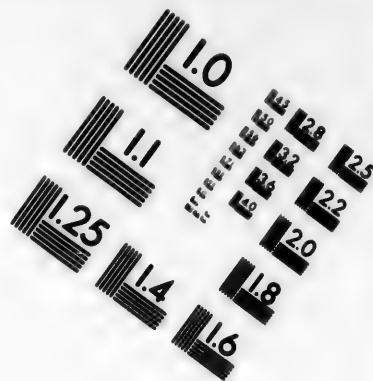
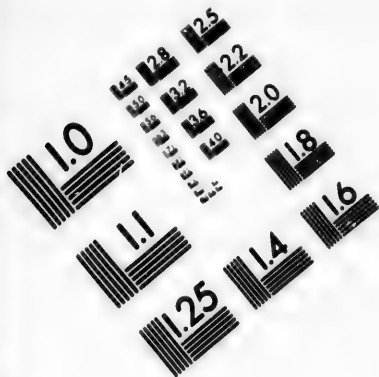
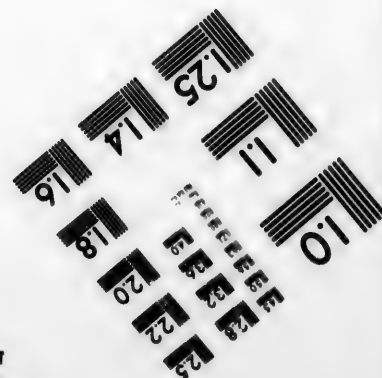
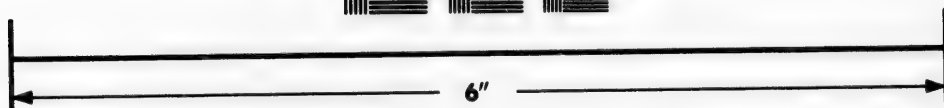
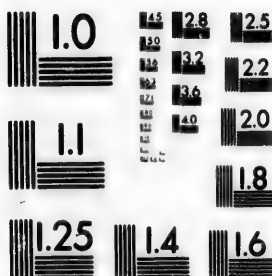


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When the abatement took place after a decree had been pronounced, but before it was drawn up, it was held, under the former practice in Chancery, that the decree must be drawn up before an application to revive could be made. (*Beamish v. Pomeroy*, 1 Chy. Ch. R. 32; followed by *Blake, V.C., Reilly v. Ross*, 2nd March, 1880.)

Formerly a suit could not be revived merely for the purpose of recovering costs; now, however, an action may be revived for that purpose, as to all costs ordered to be paid by any order made subsequent to 2nd March, 1877. (See *R. S. O.*, c. 40, s. 102.)

It was also held that, an alimony, suit might be revived by the personal representatives of the deceased plaintiff, to recover arrears of alimony which had accrued due to the plaintiff in her lifetime; at all events, to the extent of the debts remaining due by the deceased wife's estate. (*Miller v. Miller*, before *Blake, V.C.*, 15th May, 1878.)

(a) *Order, how obtained.*

Order to continue Proceedings, how obtained.—Where by reason of marriage, death, or bankruptcy, or any other event, occurring after the commencement of an action, and causing a change, or transmission, of interest, or liability, or by reason of any person interested, coming into existence after the commencement of the action, it becomes necessary or desirable, that any person, not already a party to the action, should be made a party thereto or that any person already a party thereto, should be made a party thereto, in another capacity,—an order, that the proceedings in the action, shall be carried on between the continuing parties to the action, and such new party, may be obtained on *præcipe*, upon an allegation of such change, or transmission, of interest, or liability, or of such person interested having come into existence. (*Rule 385.*)

The order is granted *ex parte*, the *præcipe* must be filed in the office where the pleadings are to be filed, and the

officer with whom the *præcipe* is filed, is to draw up and issue the order.

The *præcipe* must contain a statement of the death, marriage, or assignment, or other cause, rendering it necessary to issue the order, and must state who the persons are by, and against, whom, the action is to be continued. If the allegations in the *præcipe* are untrue, the order may be set aside, with costs, even though there be good ground on the merits for issuing the order. For forms of allegations in *præcipe* (see *Leggo's Forms*, 2nd ed. No. 566.)

(b) *Service of Order.*

Service of Order.—A copy of the order to continue the proceedings indorsed with the prescribed notice, (see *Form No. 20.*) unless the Court, or Judge, otherwise directs, is to be served upon the continuing party, or parties, to the action, or their solicitors, and also upon each of the new parties (unless the person making the application be himself the only new party), and the order is from the time of such service, to be binding on the persons served therewith; (*Rules 386-7.*) and see *Sterling v. Campbell*, 1 Chy. Cy. R. 147; except where the person served is under disability other than coverture, and has no guardian *ad litem*, in which case the order is not binding, until the lapse of twelve days from the appointment of a guardian *ad litem* to such person. (*Rule 389.*)

The copy of the order served must be indorsed with the prescribed notice, see *Form No. 20.* (*Rule 388.*)

Service, how effected.—The service of the order on the continuing parties to the action may be effected in the same manner that a pleading may be served on any such party. (See *ante* p. 92.) No provision is made for serving the *Official Guardian*, on behalf of infant parties who are added; it would, therefore, seem necessary that in all cases an infant, or other person under disability, should be served with the order; and an application must be afterwards

made to appoint a guardian *ad litem*, for such infant, or person under any disability, except coverture. If it is desired to effect service otherwise than personally, an application must be made for that purpose in Chambers. Where the Court, or a Judge, authorizes publication instead of service, the Court, or Judge, is at the same time to appoint such time for applying to discharge the order as seems proper. (*Rule 391.*) The former practice in Chancery required an office copy of the order to be served, but service of a plain copy seems now sufficient.

3. DISCHARGING ORDER.

Discharging Order.—The order may be discharged for cause, on the application of any party served therewith; or any party affected thereby, as for instance, where an order was obtained by a person claiming to be assignee of the plaintiff, the latter was held entitled to move to discharge it, though not served with the order. (*Fisken v. Ince*, 8 Pr. R. 147.)

The time for moving against the order, depends on where the service is effected, and whether or not the party served is under any disability, other than coverture.

If the order is served within Ontario, and the person served is under no disability, or under no disability, other than coverture, or being under any disability other than coverture, has a guardian *ad litem* in the action, such person may apply to the Court, or a Judge, to discharge, or vary, such order, at any time within twelve days from the service thereof. (*Rule 387.*)

Where the order is served out of Ontario, the party served has the same time to apply to discharge the order, as a defendant has to appear to a writ of summons so served; but an application may be made for shortening the time. (*Rule 390*, and see *ante* p. 44.)

Where any person served with the order, is under any disability, other than coverture, and has not a guardian

ad litem appointed in the action, such person may apply to the Court, or a Judge, to discharge, or vary, the order, at any time within twelve days from the appointment of a guardian *ad litem* for such party, and until such period of twelve days shall have expired, the order has no force or effect, as against such last mentioned person. (*Rule 389*.)

It is not sufficient to give notice of the motion to discharge the order within the twelve days, but the motion must also be made returnable within that time. (*Harris v. Meyers*, 16 Chy. 117; *Jackson v. Gardiner*, 2 Chy. Ch. R. 385; *McIroy v. Hawke*, 3 Chy. Ch. R. 66.) The Court, or Judge, however, has time to extend the time for moving. (*Rule 462*; and see *Smith v. Gunn*, 2 Chy. Ch. R. 230.) And when the motion cannot be made returnable within the twelve days, leave to move, should be obtained, before the notice of motion is served. In actions in the Chancery Division it is necessary that the motion should be set down to be heard on a Wednesday. (*Chy. O. 418, 593*.) In the other Divisions the motion may be set down to be heard on any Tuesday, or Friday, except during vacation. Two clear days' notice of the motion seems to be sufficient. (*Rule 407*).

CHAPTER XXII.

PAYMENT OF MONEY INTO, OR OUT OF, COURT.

All money formerly paid into the Courts of Chancery, Queen's Bench, and Common Pleas, and all securities vested in the officer acting as Accountant of the Court of Chancery, are now vested in the *Accountant of the Supreme Court*. (J. A. s. 68, *Rule H. C. J. X.*, see App. C.) All moneys required to be paid into Court in any action in any of the Divisions of the Supreme Court, are to be paid in with the privity of the *Accountant of the Supreme Court*.

Payment in, how made.—Money may be paid into Court by depositing the same in the Canadian Bank of Commerce at Toronto, or at any of its branches or agencies in the Province of Ontario. A direction to receive the money must first be obtained from the *Accountant*. Where the money is to be paid in, elsewhere than in Toronto, the direction will be forwarded by post on the application by letter of the party requiring the same, accompanied by a *præcipe* therefor, and a law stamp for the fee payable on the direction, and the postage for transmitting the same. The *præcipe* is to be in the form given in Schedule O. to the General Orders in Chancery, (and see *Leggo's Forms*, 2nd ed., No. 646.) On the production of this direction to the officer of the bank, he will receive the money, and sign and return to the person making the deposit, the printed receipt attached to the direction. Usually an order authorizing the payment into Court, is necessary. But where the money is paid in by a defendant in satisfaction of a claim (see *ante* p. 99), it may be paid in without an order. In such a case the money should be stated in the *præcipe* to be paid in under *Rule 215*.

Payment out, how made.—The party requiring money to be paid out of Court, must file with the *Accountant* a *præcipe* for a cheque, in the form given in Schedule O to the General Orders in Chancery (see *Leggo's Forms*, 2nd ed. No. 650), with the *præcipe*, must be produced and left with the *Accountant*, the original orders, and reports, entitling the applicant to the money, or office copies thereof. The cheque for the money is to be signed by the *Accountant*, and countersigned by the *Registrar* of one of the Divisions of the High Court, and initialed by the Chief Clerk in the *Accountant's Office*. (*Rules 477, 478.*) The orders and reports are required to be entered in the books of the *Accountant* and where they have been once entered, their production is not required, but it is sufficient to refer to them in the *præcipe* by their dates. After the orders, and reports, have been entered, they are returned to the party producing the same on application.

Money paid in, under a plea of payment under *Rule 215*, may be paid out to the plaintiff, or to his solicitor, on production of the written authority of the plaintiff. (*Rule 217.*) This authority must ordinarily be verified by affidavit. No order for payment out, is necessary in such cases.

CHAPTER XXIII.

TRANSFER, AND CONSOLIDATION, OF ACTIONS.

Transfer of Actions—Actions may be transferred from one Division to another by the order of the Presidents of such Divisions. (*Rule 392.*)

The grammatical construction of *Rule 392* would seem to indicate that the concurrence of both the President in whose Division the action is pending, and the President of the Division to which the action is to be transferred, is necessary before the transfer can be made. An order must be obtained, and it is probable that it will be granted, only on written consent of, or notice to, the opposite party.

No provision, however, is made for transferring any action from one Division to another, on the ground that the question involved therein is a legal, or equitable, one, and it would seem contrary to the spirit of the Act, that any action should now be transferred from one Division to another, upon any such ground.

In certain cases, however, the transfer of an action from one Division to another, may be directed by any Judge of any Division. Thus, where an order has been made for the administration of the assets of any testator, or intestate, a Judge of any Division may, without consent, order an action pending in any other Division, by, or against, the executor, or administrator, to be transferred to the Division where the action for administration is pending. (*Rule 394.*)

Motions, &c., may be transferred.—With a view to equalizing the business in the Divisional Courts of the High Court, the Presidents of the Divisions are from time to time, to meet together, and examine the lists of motions,

rules, and other matters, set down for argument in each of such Divisional Courts, and are to transfer, if necessary, as many of the motions, rules, and other matters, from one Divisional Court to another, in order to equalize as nearly as possible, the business to be done by the Divisional Courts. (*Rule 393.*) This transfer may be made by the Presidents of the Divisions, without any consent of, or notice to, the parties.

Consolidation of Actions.—Actions in any Division, or Divisions, may be consolidated by order of the Court, or a Judge, in the manner actions were formerly consolidated in the Superior Courts of Law. (*Rule 395.*)

Thus, if a plaintiff vexatiously bring two actions against the same defendant, for matters which might be included in one action, the actions may be consolidated, and the plaintiff may be ordered to pay the extra costs; and where actions are brought by the same plaintiff against different defendants, but the question in dispute in all, is substantially the same, upon the defendant's application all the actions but one will be stayed, on the terms of all the defendants being bound by the result of the action which proceeds. But the judgment in the test action only binds when it is tried upon the merits. (*Amos v. Chadwick*, 9 Ch. D. 459.) Where different plaintiffs bring several actions against the same defendant, and the question in dispute is substantially the same in all the actions, they may be consolidated, and ordered to proceed as one action. (See *Rule 89*; see further, as to Consolidation of Actions, *MacLennan*, 318-9.)

CHAPTER XXIV.

MISCELLANEOUS.

1. *Computation of Time.*
2. *Pending Business.*
3. *Procedure in County Courts.*

1. COMPUTATION OF TIME.

Months mean Calendar Months.—Where by the *Rules*, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceedings is limited by months, not expressed to be lunar months, such time is to be computed by calendar months. (*Rule 454.*)

Period of less than six days.—Where any limited time, less than six days from, or after, any date or event is appointed, or allowed, for doing any act, or taking any proceeding, holidays, as defined by the *Interpretation Act, i. e.*, Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, the day set apart for the celebration of the birthday of the Sovereign, and any day appointed by the Governor-General, or Lieutenant-Governor as a Public Holiday, or Fast, or Thanksgiving Day. (*R. S. O. c. 108, sub-s. 16*), are not to be reckoned in the computation of such limited time. (*Rule 455.*)

Days, how computed.—In all cases in which any particular number of days not expressed to be clear days, is prescribed by the Act, or the *Rules*, or practice of the Court, the same is to be reckoned exclusively of the first day, and inclusively of the last day. (*Rule 456.*)

Where last day is Sunday.—Where the time for doing any act or taking any proceeding expires on a Sunday, or

other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding is, so far as regards the time of doing, or taking, the same, to be held to be duly done, or taken, if done or taken on the day on which the offices shall next be open. (Rule 457.)

Service.—Service of pleadings, notices, summonses, orders, rules, and other proceedings is to be effected before the hour of ~~six~~^{four} in the afternoon, except on Saturdays, when it is to be effected before the hour of two in the afternoon. Service effected after ~~six~~^{four} in the afternoon on any week day, except Saturday, is to be deemed to have been effected on the following day. Service effected after ~~two~~ in the afternoon on Saturday, is to be deemed to have been effected on the following Monday. (Rule 459.)

Enlargement or Abridgment of Time.—The Court, or a Judge, has power to enlarge or abridge the time appointed by the Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed. (Rule 462.)

2. PENDING BUSINESS.

Provision as to pending Business.—In all causes, matters, and proceedings which have been fully heard, and in in which judgment has not been given, or having been given, has not been signed, drawn up, passed, entered, or otherwise perfected, at the time appointed for the commencement of the Act, such judgment, decree, rule, or order, may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of the Act, in the name of the same Court, and by the same Judges, and officers, and generally in the same manner, in all respects as if the Act had not passed; and are to take

effect, to all intents and purposes, as if the same had been duly perfected before the commencement of the Act. (*J. A. s. 11.*)

And every judgment, decree, rule, or order of any Court whose jurisdiction is vested in the High Court of Justice, which has been duly perfected at any time before the commencement of the Act, may be executed and enforced, and, if necessary, amended or discharged, by the High Court of Justice, in the same manner as if it had been a judgment, decree, rule, or order of the High Court; and all causes, matters, and proceedings whatsoever, which were pending in any of the Courts whose jurisdiction is vested in the High Court at the commencement of the Act, are to be continued and concluded in and before the High Court of Justice; and the High Court is to have jurisdiction for so continuing, and concluding, matters criminal, as well as civil. (*Ib.*)

And the High Court has the same jurisdiction in relation to all such causes, matters, and proceedings, as if they had been commenced in the High Court of Justice, and continued therein down to the time at which the Act went into effect; and, so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, are to be continued and concluded, in and before the High Court, as directed by the *Rules* or *Orders* of Court. (*Ib.*)

*Actions in the Queen's Bench and Common Pleas
commenced before 21st August, 1881.*

Where no declaration has been filed the action is to be continued according to the practice of the High Court of Justice; and where under the former practice at law, a declaration was necessary, a statement of claim is to be filed, and all subsequent proceedings carried on under the *Judicature Act*.

Where a declaration has been filed, the action is to be continued to the close of the pleadings, according to the

former practice of the Court in which the action was brought, and thenceforward according to the practice of the High Court. (*Rule 493.*)

Suits in Chancery commenced before 21st August, 1881.

All causes in which neither notice of motion for decree has been served, nor replication filed, are to be continued according to the former practice in Chancery up to the time when, according to such practice, notice of motion for decree could be served, or replication filed, and from thenceforth according to the practice of the High Court. All other causes, matters and proceedings (including all causes which have been heard, or in which notice of motion for decree has been served, or replication filed), are, so far as relates to the form and manner of procedure, to be continued and concluded in the same manner they would have been in the Court of Chancery. (*Rule 494.*)

3. PROCEDURE IN COUNTY COURTS.

Subject to the provisions of the Act, and to the *Rules* of Court, the pleadings, practice, and procedure for the time being, of the High Court of Justice, is to apply and extend to the County Courts, where the pleadings, practice, and procedure of the County Courts, at the time of the passing of the Act, corresponded with those of the Superior Courts of Law. (*Rule 490*, and see *R. S. O. c. 43*, ss. 23, 29-31, 33.)

Judges of the County Courts, and Division Courts, have now power to award costs in actions in which the plaintiff fails to recover judgment, owing to the Court not having jurisdiction. (*Rule 489.*)

Formerly where the Court had no jurisdiction to entertain a suit, it could make no order as to costs. (*Powley v. Whitehead*, 16 U. C. Q. B. 589.)

APPENDIX.

APPENDIX A.

ORDER IN COUNCIL approved by His Honour the Lieutenant-Governor, the 30th day of June, A.D. 1881.

Upon consideration of the report of the Honourable Oliver Mowat, Attorney-General, dated 2nd May, last, the Committee of Council advise that the following appointments and arrangements be made under the Judicature Act:—

That Mr. Dalton shall be Master in Chambers, at a salary of \$3,000, and Mr. W. B. Heward and Mr. Arnaldi Clerks in Chambers.

That Mr. Stephens shall succeed Mr. Dalton, as Clerk of the Crown and Pleas of the Court of Queen's Bench, at a salary of \$2,000 per annum, and shall be called "Registrar of the Queen's Bench Division;" and it shall be part of his duty, from time to time, on the request of the Master in Chambers, or of a Judge of the High Court, to sit with, or for, such Master.

That Mr. Jackson retain his office, as Clerk of the Crown and Pleas of the Court of Common Pleas, and that he be designated "Registrar of the Common Pleas Division."

That Mr. George Holmsted shall be Registrar of the Chancery Division, and Senior "Judgment Clerk of the High Court."

That Mr. A. F. McLean be Assistant Registrar of the Chancery Division and Junior Judgment Clerk of the High Court, at a salary of \$1,400 per annum; to be reckoned from 1st July, next.

That Mr. Taylor be Master in Ordinary of the Supreme Court, at his present salary.

That Mr. Thom and Mr. Clark be the Taxing Officers, and that they be each paid \$1,600 per annum.

That Mr. Lee retain his office of Clerk of Records and Writs, and that his salary be \$1,200 per annum; the increase to be reckoned from the 1st January, last.

That Mr. Alexander Macdonell, Clerk of the Queen's Bench, be paid \$1,400 per annum.

That Mr. Semple, Entering Clerk in Chancery, be paid \$700 per annum.

That Mr. Stewart be transferred from the office of the Clerk of Process to the Accountant's office.

That this Order shall take effect on and from the 22nd day of August, next, except the provisions thereof increasing salaries, which shall take effect from the times hereinbefore particularly stated.

(Certified,)

J. G. SCOTT,
Clerk, Executive Council,
Ontario.

APPENDIX B.

ADDITIONAL RULES OF THE SUPREME COURT OF
JUDICATURE FOR ONTARIO.

(Passed 25th August, 1881.)

495. These Rules may be cited as the Rules of the Supreme Court of Ontario, 1881; or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Rule mentioned in the margin.

496. In Rule 45, sub-section (*d*), the word "act" is hereby substituted for the word "action," in the first line thereof.

497. In Rule 74, sub-section (*a*), the word "satisfied" is hereby substituted for the word "notified," in the third line thereof.

498. In Rule 246, sub-section (*a*), the word "produce" is hereby substituted for the word "proves," in the third line thereof.

499. In Rule 352, sub-section (*b*), the word "periods" is hereby substituted for the word "period," in the fourth line of the said sub-section.

500. In Rule 376, the word "proceeding" is substituted for the word "proceedings," in the fourth line thereof.

501. Rule 100 is hereby amended by inserting after the word "summons," in the fourth line thereof, the words "or on notice, as the case requires."

502. Rule 78 is amended by adding after the word "behalf," in the last line, the words "in which the reference, when required by the practice, shall be to the Master, or Local Master."

(Passed 5th September, 1881.)

503. Where a seal is, under the 51st section of the Judicature Act, "impressed on any document which, before the passing of the said Act, did not require to be sealed, the fee of fifty cents mentioned in the 53rd section of *The Superior Courts of Law Act*, R. S. O., c. 39, shall not be payable on such documents.

APPENDIX C.

RULES OF THE HIGH COURT OF JUSTICE.

(Passed 22nd August, 1881.)

I.—It is ordered by the Judges of the High Court, that one of the Judges of the Queen's Bench Division, or of the Common Pleas Division, shall sit in open Court, in Osgoode Hall, every week, excepting during the long vacation, and except during the period from the 24th day of December to the 6th day of January, both days inclusive, for the purpose of disposing of all Court business in the said Divisions which may be transacted by a single Judge.

II.—Such sittings shall be held on Tuesday and Friday of each week, and on such other days as the Judge holding such sittings may direct.

III.—One of the Judges of the Chancery Division of the said High Court shall sit in open Court, in Osgoode Hall, every week, except during the long vacation, and except during the period from the 24th day of December to the 6th day of January, both inclusive, for the purpose of disposing of all business of the said Division which may be transacted by a single Judge.

IV.—The business before the said Judge shall be taken, as nearly as may be provided, by the General Orders of the Court of Chancery.

V.—Demurrers and special cases shall be set down to be heard, and notice thereof given to the opposite party, six days before the day on which they are to be heard.

VI.—A copy of the demurrer book, or of the special case, shall be left with the Registrar of the Division in which the action is pending, for the use of the Judge before whom such demurrer, or special case, is to be heard, two days before the day appointed for the hearing.

VII.—All rules, or orders *nisi*, directed to be issued by the Judge shall be four-day rules, and shall be set down to be heard at the first sittings of the Judge in open Court, for argument, after the same are returnable, unless otherwise ordered by the said Judge.

VIII.—The proceedings before a Judge sitting as aforesaid, shall show on their face, in any judgment, decree,

rule, or order, to be given, or made, that the business was carried on before a single Judge, as follows:—

“In the High Court of Justice for Ontario.
Before the Hon. Mr. Justice —— [*naming the Judge.*]”

IX.—It is ordered that the Divisional Courts of the High Court do meet on Tuesday, the 23rd day of August, instant, at 11 o'clock, a.m.

(Passed 25th August, 1881.)

X.—All mortgages, stocks, funds, annuities and securities, and all interest and estate therein, and all moneys and effects standing in the name of the Accountant of the Court of Chancery, or the Referee in Chambers, or any other officer named by the Court of Chancery, or in the name of the Clerk of the Crown and Pleas of the Court of Queen's Bench, or the Clerk of the Crown and Pleas of the Common Pleas, on the 21st day of August, A.D. 1881, be and the same are hereby transferred to and vested in the Accountant of the Supreme Court, as such Accountant; subject to the same trusts as respectively attached thereto: and the same officers are to execute all necessary cheques, or documents to effect a formal transfer thereof.

INDEX.

ABATEMENT. *See* CHANGE OF INTEREST.

none, where cause of action survives to parties already before Court 255.

facts formerly pleadable in, how to be set up, 89.
pleas in, abolished, 89.

ABSENT DEFENDANT,

action against, for what causes it may be brought, 66.
if a foreigner, to be served with notice in lieu of writ, 56.

ACCOUNT,

action for, judgment, how obtained in, 76.
motion for, after appearance, 81.
may be made at any stage, 207.

ACCOUNTANT OF SUPREME COURT, 9.

payment into Court, 264.
payment out of Court, 265.

ACTION,

account, for, motion for judgment in, 76, 207.
causes of action which may be joined, 37-38.
leave to join, when necessary, 38.
how obtained, 40.
causes of action which may not be joined, 39-40.
consolidation of, 267.
dismissal of, if writ issued without authority, 220.
for not filing statement of claim, 82, 115.
reply, 115.
giving notice of trial, 118.
security for costs, 226.

foreclosure, for. *See* MORTGAGE SUITS.

land, for. *See* ACTION FOR RECOVERY OF LAND.

motions in, transferred from one Division to another, 266.

redemption, for. *See* MORTGAGE SUITS.

sale, for. *See* MORTGAGE SUITS.

staying, when commenced without authority, 220.

test, ordering trial of 257.

does not bind others, unless tried on merits, 267.

transfer of, 266.

trial of. *See* TRIAL.

ACTION FOR RECOVERY OF LAND,

appearance by landlord, in, 60.

person not named as defendant, 61.

notice of, when necessary, 60, 62.

notice limiting defence may be filed with, 60, 61.

judgment for, default of, 71.

causes of action which may be joined with, 39.

default of appearance, judgment for, 71.

ACTION FOR RECOVERY OF LAND—(Continued),

- default of defence, proceedings on, 113.
- judgment on, 113.
 - where other claims joined, 113.
 - where some defend, and others do not, 113.
 - final judgment, 113.
 - interlocutory judgment, 113.
- defence, statement of, 89.
 - defendant may rely on his possession, 89.
- equitable defence must be specially raised, 89, 90.
- leave to join other causes of action with, when necessary, 39.
- non-appearance of defendant at trial, 123.
- place of trial, local, 87.
- service of writ where possession vacant, 5/

ADDRESS FOR SERVICE,

- plaintiff's to be indorsed on writ, when, 47.
 - if omitted, where necessary, proceedings, how served, 47.
- defendant's to be stated in appearance, when, 59.
 - if fictitious, appearance may be set aside, 59.

ADMINISTRATION,

- judgment for, on *precipe*, 75.
- motion for, how made, 211, 216.
 - by whom made, 216.
- parties to actions for, 26.

ADMINISTRATOR,

- claims by, or against, not to be joined with other claims, 39-40.
- enquiry as to wilful neglect and default of, when made, 217.

ADMISSION,

- allegation in pleadings to prevent implication of, 88.
- in affidavits 130.
 - motion for judgment on, 130.
- in pleadings to be made, 88.
 - how made, 88.
 - motion for judgment on, 130.
- in examination of party, 130.
 - motion for judgment on, 130.
- notice to make, 168.
- proof of, 168.
- silence of pleading, none, 88.

ADMIT,

- each party by his pleading, to admit such facts as are true, 88.
- notice to, 168.

AFFIDAVITS,

- costs of, improperly drawn, 170.
- commissioner to take, 172.
- description and signature of deponent, 171.
- form of, 170.
- illiterate deponent, certificate in case of, 171.
 - not to be used if not certified, 171.
- interlineation in, 171.
- jurat, 171.
- landlord's to be filed with appearance, 60.
- notice, by whom filed, 171.
- office copies of may be used, 172.
- on motions in Court, 170, 203, 204,
 - cross-examination on, 204, 205.
 - notice of, 170.
- in Chambers, 170, 213.
 - filing, 213.

AFFIDAVITS—(Continued),

- on motion for judgment, when admissible, 162.
- cross-examination on, how obtained, 163-4.
- pleading, and demurring, for, 107.
- service of writ, of, what to state, 57.
- stamps on, 172.
- trial, at, 161, 162.
- particular facts provable by, 161.
- trial of action, when evidence given by, 164.
- where several deponents 171.

AFFIDAVIT ON PRODUCTION. See DISCOVERY.**ALIMONY,**

- action for, next friend need not be named, 30.
- defendant in, not entitled to security for costs, 223.

ALLOWANCE OF SERVICE OF WRIT,

- when necessary, 65, 66.
- evidence on application for, 66.

AMENDMENT,

- of proceedings, 247.
- may be ordered by Court of Appeal, 3.
- writ and indorsements, 51, 248.
- PLEADINGS, UNDER ORDER, 248.
- adding or striking out parties, 248-9.
- substituting parties, 249.
- application for, where made, 249.
- when to be made 249.
- BY CONSENT, 250.
- WITHOUT LEAVE, 250.
- statement of claim, 250.
- set-off and counter-claim, 250.
- statement of defence, 251.
- consequent on amendments by opposite party, when made, 251.
- cannot be made in long vacation, 251.
- disallowance of, 252.
- facts formerly raised by new assignment to be introduced by, 88.
- how made, 251.
- long vacation not to be reckoned in time for, 251.
- service of, 252.
- judgments, 143, 252, 253.
- orders, 252, 253.

ANNUAL RENT,

- questions as to taking of, appealable without leave, 4.

APPEAL,

- Court of, 2.
- cases appealable to, 3-4.
- not appealable, 4.
- from Judge in Chambers, 218.
- Master in Chambers, &c., 218.
- Local Masters, 218.

APPEARANCE,

- by individual sued in name of firm, 60.
- landlord, 60.
- partners sued in name of firm, 59.
- two or more defendants, 60.
- entry of, 58.
- forms of, 58, 59, 60.
- notice of, when necessary, 60, 62.

APPEARANCE—(*Continued*),

- notice limiting defence may be filed with, 60-61.
- setting aside, where fictitious address given, 59.
- where to be entered, 58.
- default of, proceedings on, 67-77.
 - in actions formerly cognizable at law, 68-73.
 - exclusively cognizable in equity, 73-77.
- proceedings after, 78-82.
 - where writ specially indorsed, 78.
 - where partial defence put in, 79.
 - in actions for account, 81.
 - foreclosure, 81.
 - sale, 81.
 - redemption, 81.
 - other actions, 81.

ARBITRATORS,

- powers of, 137.
- trials before, 137.

ASSIGNEE IN INSOLVENCY,

- claims as, cannot be joined with others without leave, 39.

ASSIGNMENT. *See* CHANGE OF INTEREST.

- pendente lite* proceedings on, 257.

ASSIZE, CLERK OF, 12, 19.**ATTACHMENT,**

- when it may issue to enforce judgment, 149.
- notice of motion for, to be personally served, 203.
- order for, necessary, 150.
- no detention for costs, after contempt purged, 150.

ATTACHMENT OF DEBTS. 155-160,

- affidavit for, by whom made, 155.
- debts attachable, 155-157.
 - not attachable, 157, 158.
- examination of debtor for, 152-154.
 - officers of a company, 152.
- garnishee should not pay without order, 160.
 - protected by order, 160.
 - may pay money into Court, 160.
 - effect of bankruptcy of debtor, 160.
 - should set up assignment of debt, if he know of it, 160.
- issue as to liability of garnishee may be ordered, 159.
- order for, effect of, 158.
- payment by garnishee, 159, 160.

ATTORNEY. *See* SOLICITORS.**ATTORNEY-GENERAL,**

- actions by, 32, 33.

BANKRUPTCY,

- of parties, proceedings on, 257.
- See* CHANGE OF INTEREST.

BOOKS TO BE KEPT BY OFFICERS, 22, 23.**CASE.** *See* SPECIAL CASE.**CAUSE OF ACTION,**

- absent defendant, for what he may be sued, 65-66.
- joinder of, 37-38.
- improperly joined, may be struck out, 38.
- remedy when several cannot be tried together, 38.

- CERTIFICATE OF LIS PENDENS,**
indorsement of writ for, 44, 49.
how obtained, 49.
may be vacated, 49.
- CHAMBERS.** See MASTER IN CHAMBERS.
Judge in, appeal from, to Court of Appeal, 4.
Divisional Court, 7.
motions in, how made, 209, 212-214.
when on notice, 212.
when on summons, 214.
adjournment of, before Judge, 215.
- CHANCELLOR OF ONTARIO,**
retains his title, 2.
President of Chancery Division, 2.
- CHANCERY DIVISION, 2.**
officers of, 10-12, 19.
President of, 2.
- CHANCERY ORDERS.** See CONSOLIDATED GENERAL ORDERS OF THE COURT OF CHANCERY CITED.
- CHANGE OF INTEREST,**
proceedings on, 254-263.
abatement, none where cause of action survives to, or against, parties before the Court, 255.
assignment *pendente lite*, 267.
of equitable estate, 258.
bankruptcy, 257.
death of sole plaintiff, 256.
one of several plaintiffs, 256.
sole defendant, 257.
one of several defendants, 257.
marriage of female party, proceedings on, 255-256.
order to continue proceedings on, 259.
by whom it may be obtained, 259.
before decree, 259.
after decree, 259.
how obtained, 260-261.
service of, 261.
discharging, 262.
motion for, when to be made, 262-263.
- CHIEF JUSTICES OF QUEEN'S BENCH, AND COMMON PLEAS,**
retain their titles, 2.
Presidents of Queen's Bench, and Common Pleas, Divisions, 2.
- CHOSE IN ACTION,**
parties to action, by assignee of, 27.
- CLAIM.** See STATEMENT OF CLAIM.
- CLASS SUIT,**
plaintiffs in, 31.
- CLERK OF ASSIZE, 12, 19.**
- CLERK OF THE PROCESS, 10, 19.**
- CLERK OF RECORDS AND WRITS, 11.**
- CLOSE OF PLEADINGS.**
when pleadings closed, 86-87.
- COMMON LAW,**
when it conflicts with equity, the latter to prevail, 5.

COMMON PLEAS DIVISION, 2.

officers of, 10, 19.
President of, 2.

COMPANY. See DISCOVERY.

examination of officer of, for attachment of debts, 152.
of officer of, for discovery, 230.
service of writ on, 56.

COMPUTATION OF TIME.

days, how computed, 267.
"month" means calendar month, 268.
periods of less than six days, holidays not to be reckoned in, 268.
Sunday, 268.

CONCURRENT WRITS OF SUMMONS, 42.**CONFESSION OF DEFENCE, 105.**

when it may be delivered, 91.
costs on, 105.

CONSENT,

amendment in pleadings, may be made by, 250.
orders, and judgments, not appealable without leave, 4.
to Judge of C. C. or Local Master, entertaining application, does not
preclude appeal, 218.

CONSOLIDATION OF ACTIONS, 267.**CONTINUING PROCEEDINGS,**

order for, on change of interest, 259.
by whom obtained, 259.
how obtained, 260-261.
service of, 261.
discharging, 262.
motion for, when to be made, 262-263.

CONTRIBUTION,

third party liable to defendant for, notice to, 101.

CORPORATIONS AGGREGATE,

officers of, may be examined for discovery, 230.
may be examined as to debts owing to, &c., 152.
service of writs on, 56.

COSTS. See SECURITY FOR COSTS—TAXATION OF COSTS.

appeal as to, leave required, 4.
application to deprive successful party of, 174.
application to extend time, 180.
case tried by jury, to follow event, 174.
copies of documents, 180.
demurrer allowed without argument, 110-111.
allowed on argument, 109.
overruled, 110.
discretion of Court as to, 174-175.
disbursements, 187.
examination of judgment debtor, 155.
fees of solicitors, 188.
judgment for, where defence arises after action brought, 91.
quere, whether it can be entered until damages assessed,
113.
on acceptance of money paid into Court, 99.
nominal bill taxing, 180.
order depriving successful party of, no appeal from, 175.
principles on which awarded, 173-176.
refusal to bring in bill of, 180.

COSTS—(Continued),

- revision of taxation of, 181-183.
 - when compulsory, 181.
 - when optional, 182.
- review of taxation, 183, 184.
 - how obtained, 183, 184.
- appeal to Judge on, 184.
 - evidence on, 184.
- set-off, how allowed, 180-181.
- successful party, to, when refused, 176.
- tariff of, 188.
- taxation of, 176.
- tender of \$5 to formal respondent, 158.
 - effect of, 158.
- unnecessary attendance on petition, 178.
 - proceedings, to be disallowed, 178-179.

SOLICITOR AND CLIENT.

- delivery of bill, of, order for, on *præcipe* in Chancery Division, 196.
- taxation of, order for, how obtained, 185.
 - on *præcipe*, by whom issued, 186.
 - effect of, 187.
 - form of, 186.

COUNSEL,

- address of, at trial, 121.
- signature of, to special case unnecessary, 134.

COUNTER CLAIM, 97. See STATEMENT OF DEFENCE—PLEADINGS.

- against whom it may be filed, 95.
- amendment of. See AMENDMENT.
- claims which may be set up by, 97-98.
- defence to, arising after its delivery, 91, 106.
 - how pleaded, 106-107.
- relief claimed under, 98.
- security for costs, when ordered against defendant filing, 225.
- striking out, 98.
- third party affected by, 98.
 - service of, on, 98.
 - appearance by, 99.

COUNTERMAND,

- of notice of trial cannot be given, 118.

COUNTY COURT. See JUDGE OF COUNTY COURT.

- proceedings in to be governed by *Judicature Act*, and *Rules*, 271.

COURT,

- Appeal, of, 2. See COURT OF APPEAL.
- High, 2.
- Supreme, 1.
- officers of, 8-21.
- payment into, how made, 264.
 - out of, how made, 265.
 - only upon order of a Judge, 211.

COURT OF APPEAL,

- appeals to, 3.
- Court of Record, 2.
- Division of Supreme Court, 2.
- execution and enforcement of orders of, 3.
- jurisdiction and powers of, 3.
- matters appealable without leave, 3.
 - appealable with leave, 4.
 - which are not appealable, 4.
- Registrar of, 10.

CREDITOR,

action by one, of several, on behalf of all, 31.

CROSS-EXAMINATION,

on affidavits to be used at trial, 163-164.
notice of, 163.
deponent to be produced at trial, for, 163.
on motions, 170, 204, 205.
notice of, 205.

DATE, AND TESTE,

of writ of summons, 45.
execution, 146.

DATE OF SERVICE OF WRIT,

to be indorsed on writ within 3 days, 57.

DATE,

in pleadings, to be in figures, 85.
of judgment, 142.

DEATH OF PARTIES.

of plaintiff, proceedings on, 256.
of defendant, proceedings on, 257.
See CHANGE OF INTEREST.

DEBTS. See ATTACHMENT OF DEBTS—EXAMINATION OF JUDGMENT DEBTOR.**DEFAULT,**

of appearance, proceedings on, in actions formerly cognizable at law, 68-73.
in actions where special indorsement omitted, 70.
in actions formerly exclusively cognizable in equity, 73-77.
of pleading, proceedings on, 112-116.
judgment in actions of debt, 112.
when final, or interlocutory, 113, 114.
judgment by, may be set aside on notice, 116.
notice of trial, of, dismissal of action for, 115.

DEFENCE. See COUNTER CLAIM—PLEADINGS—STATEMENT OF DEFENCE.

how made, 95.
arising after action, or after delivery of defence, how pleaded, 91.
leave to make, to specially indorsed writ, 79-80.
limited, notice of, may be filed with appearance, 60-61.
withdrawal of, 124.

DEFENDANTS. See PARTIES TO ACTIONS.

motion by, for receiver, injunction, &c., 202.
delivery up of property subject to lien, 209.
non-appearance of, at trial, 122.

DEFENDED ACTIONS,

how to be tried, 120.
separate list to be made, of, 120.

DELIVERY,

of pleadings, 92, 93, 96, 108.
statement of claim, 93.
defence, 96.
reply, 106.
demurrer, 108.
demurrer book, 109.
copy of pleadings for Judge at trial, 120.

DEMURRER,

- allowed without argument, when, 111.
- affidavit to plead and demur, 107.
- service of, 107.
- amendment, not to be made pending, 110.
- except by order, 110.
- or consent, 110.
- argument of, 109.
- costs, when allowed on argument, 109.
- when overruled, 110.
- allowed without argument, 110.
- delivery of demurrer book, 109.
- entry for argument 108-109.
- notice of, 109.
- filing, 108.
- form of, 108.
- judgment on, 110.
- entry of, 110-111.
- leave to plead and demur, how obtained, 108.
- pleading over, 110.
- service of, 108.
- setting aside, 108.

DEPUTY CLERKS OF THE CROWN, 15.

- books to be kept by, 22-23.
- cause list, how prepared, 120.
- duty of at trial, 124.
- entry of action for trial with, 119.
- fees for, when to be paid to Deputy Registrar, 119.
- may take examination of judgment debtor, 153.
- may issue order on *precipe* for taxation, 186.
- orders made by, requiring entry, to be entered in Toronto, 18, 75, 114.
- powers of, 17.
- taxation improper, by, liable for costs of revision, 183.

DEPUTY REGISTRAR, 16.

- books to be kept by, 22-23.
- duty of, at trial, 124.
- entitled to fees for entering action for trial in Chancery Division, 119.
- orders made by, requiring entry, to be entered in Toronto, 18, 75, 114.
- whether "orders" includes judgments, *quæ re*, 18.
- powers of, 17.
- to attend trial of actions in Chancery Division, 119.

DISCLOSURE,

- of address of plaintiff, 220.
- of names of partners, 32, 221.

DISCONTINUANCE, 105.

- costs payable on, 105.
- no defence to subsequent action, 105.
- none, after entry of action for trial, except by leave, 123.
- or by consent, 124.

DISCOVERY,

- costs of examination for, 236.
- examination of parties for*, IN CHANCERY DIVISION, 229-233.
 - by plaintiff, 230.
 - by defendant, 231.
 - where held, 232.
 - attendance of party, 232.
 - non-attendance of party, 232-233.
 - second, when allowed, 233.
 - officers of corporation, 230.

DISCOVERY—(Continued),

- examination of parties for*, in Q. B. and C. P. DIVISION, 233-235.
 - when it may be had, 234.
 - how obtained, 234.
 - re-examination, when granted, 235.
 - attendance of party, how obtained, 235.
 - consequence of non-attendance, 235.
- examination*, how far evidence, 236.
- production, and inspection of documents*, 236-246.
 - ORDER OF COURSE for, how obtained, 237.
 - when obtainable, 238.
 - service of, 238.
 - affidavit in answer, 238-239.
 - by officers of company, 238.
 - by next friend, 239.
 - must be filed though no documents, 239.
 - not to be sworn before order, 239.
 - cross-examination on, 242.
 - consequence of not filing, 242.
 - documents to be produced, 239.
 - how identified if not produced, 240.
 - privileged, 240-242.
 - joint possession, 241.
 - state documents, 240.
 - title deeds, 240.
 - opinions of counsel, 240.
 - reports to solicitor, 241.
 - mortgage deeds, 241.
 - criminating, 241.
 - not relating to question in issue, 242.
 - held in different character, 242.
- SPECIAL ORDER for, 243.
 - when obtainable, 243.
- NOTICE for, when it may be given, 244.
 - how to be complied with, 244-245.
 - consequence of non-compliance, 245.
- costs of notices, and orders, for production, 245.
 - when unnecessary may be disallowed, 179.
- where right to production contested, preliminary question may be tried, 245.

DISCRETION,

- orders made by Judge in exercise of, when appealable, 4.

DISMISSAL OF ACTION,

- for non-delivery of statement of claim, 115.
 - of reply, 115.
 - of notice of trial, 115.
- non-attendance of plaintiff for examination for discovery, 233.
- non-production by plaintiff, 242.
- not giving security for costs, 226.

DISPUTE NOTE, 100.

- when it may be filed, 95.
- defence provable under, 100.
- defendant filing entitled to notice of taking of account, 113-114.
- judgment on *præcipe* after filing of, when obtainable, 81.

DIVISIONAL COURTS,

appeals from, 3, 4.
business to be transacted by, 6-7.
consent cases, may be heard before, 7.
constitution of, 6, 127.
motion for new trial, in jury cases, to be made to, 128.
setting aside judgment, 129.
sittings of, 6.

DIVISIONS,

of Supreme Court, 1.
of High Court of Justice, 2.
jurisdiction of, 5.

DOCUMENTS, PRODUCTION OF. *See* DISCOVERY.

DURATION OF WRITS,

of summons, 50.
of execution, 147.

EJECTMENT. *See* ACTION FOR RECOVERY OF LAND.

appearance by landlord, 60.
 person not named as defendant, 61.
 notice of, when necessary, 60, 62.
causes of action not to be joined in, without leave, 39.
causes of action which may be joined, without leave, 39.
default of appearance, judgment, on, 71.
 may be final for part, and interlocutory for part, 71.
 costs on, 71.
 affidavit for, 71.
limited defence in, 61.
non-appearance of defendant at trial, 122-123.
place of trial, local, 87.

ENLARGEMENT,

of time allowed by *Rules*, power of Judge to grant, 269.

ENTRY OF JUDGMENT, 125, 126, 138-142.

EVIDENCE,

absent witnesses, of, how taken, 164, 168.
admissions, how proved, 169.
commission to take, 164.
 certificate of Master for, what to contain, 165.
 commissioners to be sworn, 167.
 costs of, 168.
 depositions to be signed, 168.
 examination of witnesses under, 165.
 interrogatories, when to be delivered, 167; filing of, *Id.*
 interpreters, and clerks, may be employed, 168.
 motion for, 165; where to be made, *Id.*
 notice of execution of, 165, 167.
 order for, what to contain, 165.
 return of, 168.
 stay of proceedings, 165.
documents, production of, 169. *See* DISCOVERY.
Letters Rogatory, how obtained, 169.
on motions, 170.
 for judgment, 162.
oral, on motions, how obtained, 205, 207.
production of documents, 169. *See* DISCOVERY.

EVIDENCE—(Continued),trial, before. *See* DISCOVERY.

at, 120.

affidavits, when admissible at, 161, 162.

on motion of judgment, 162.

filing, time for, 163.

cross-examination, on, 163.

if required, witness to be produced at trial, 162.

production of deponents at trial, for, 163, 164.

improper admission of, no ground for new trial, 128.

rejection of, no ground for new trial, 128.

particular facts may be proved by affidavit, 161.

except where cross-examination required, 162.

witnesses to be examined *visa voce*, 161.

may be examined before Examiner, 162.

EXAMINATION. *See* DISCOVERY.

of parties before trial, 229-236.

EXAMINATION OF JUDGMENT DEBTOR,

when it may be made, 151-152.

how attendance enforced, 153.

officer to take examination, 153.

production of books, 153.

non-attendance of debtor, 154.

unsatisfactory answers on, 154.

costs of, 155.

EXAMINERS. *See* SPECIAL EXAMINERS.**EXECUTION,**

against a firm, 150-151.

partners, 150-151.

leave to issue, when necessary, 151.

See ATTACHMENT—SEQUESTRATION—WRIT OF POSSESSION.

date and teste of, 146.

duration of, 147.

former rights to, preserved, 144.

how issued, 146.

immediate, certificate for, 125.

land, to recover, 148, 149.

indorsement of, 146.

money, to recover, 148.

leave to issue, 151.

renewal of, 147.

return of, 147.

six years, must be issued within, 145.

staying, 148.

writs of *f. fa.*, 145.

when it may issue, 145.

where issued, 146.

recover money, to, 148.

land, 148-149.

enforce mandatory judgment, to, 149, 150.

conditional judgment, to enforce, 150.

EXECUTOR,

claims by, or against, cannot be joined with others, 39-40.

wilful neglect and default of, enquiry as to, when made, 217.

FEEs,

disbursements, what payable, 187.

solicitor's, tariff of, 188.

FIERI FACIAS. See EXECUTION.

FIGURES,

dates, sums, and numbers, in pleadings, to be in, 142.

FILING,

appearance, 58.

copy of writ, on issuing original, 48.

where no statement of claim required, 81.

pleadings, 92.

FIRM,

action against, 35.

by, 32.

appearance by partners, 59.

execution against, 150-151.

names of members, disclosure of, 32, 221.

may sue in name of firm, 32.

be sued in name of firm, 35.

service of writ on, 55.

FORECLOSURE. See MORTGAGE SUITS.

account, how taken, 113.

notice of when necessary, 113.

default of appearance, judgment how obtained, 73.

default of defence, judgment how obtained, 113.

dispute note, 95, 113, 114.

notice of taking account, 113, 114.

sale instead of, whether defendant can now get, by depositing \$80,
quere, 75.

FOREIGNER,

resident abroad, to be served with notice, in lieu of writ, 56.

FRAUD,

how pleaded, 85.

GARNISHEE. See ATTACHMENT OF DEBTS.

GUARDIAN AD LITEM,

to infants, appointment of, 55, 64, 65.

to lunatics, appointment of, how made, 63.

official. See OFFICIAL GUARDIAN.

HABEAS CORPUS,

application for, where to be heard by Divisional Court, 7.

excluded from jurisdiction of Master in Chambers, 210.

Local Masters, 214.

County Court Judges, 214.

HEARING. See TRIAL.

HIGH COURT OF JUSTICE,

constitution of, 2.

Divisions of, 2.

Judges of, 2.

judicial business of, 6.

officers of, 10-19, 20-21.

President of, 2.

Rules of, 275.

HOLIDAYS,

when excluded in computation of time, 268.

HUSBAND,

where necessary party to action by wife, 30.

against wife, 34.

HUSBAND AND WIFE. *See* MARRIED WOMAN.

claims by, and against, them jointly, may be joined with separate claims, 38.

INDORSEMENT OF WRIT OF SUMMONS, 45-47.

address of solicitor or party suing out, 47.

for service, when, 47.

amendment of, 248.

certificate *lis pendens*, to obtain, 46, 49.

character in which plaintiff sues, 47.

defendant is sued, 47.

class suit, in, 31.

date of service of writ, 57.

name of solicitor, or party, suing out, 47.

mortgage suits, 45.

special, 46.

omitted, proceedings in default of appearance, 70.

statement of claim, or relief, required, 45.

special indorsement, 46.

omitted, proceeding to be taken, in default of appearance, 70.

INDORSEMENT OF WRIT OF EXECUTION, 146.**INFANTS,**

actions by, 27.

next friend of, need not be solvent, 27.

actions against, 33.

service of writ, when to be personal, 54.

on official guardian only, 55.

guardian *ad litem* of, how appointed, 55, 64, 65.

who to be appointed, 65.

INFORMATION,

commenced by writ, 32.

INJUNCTION,

interim, not obtainable against married woman to prevent alienation of separate estate, 34.

motion for, 207, 210.

by defendant before appearance, 202.

writ of, abolished, 207.

order for, to have effect of, 207.

INQUIRIES AND ACCOUNTS,

may be directed at any stage, 207.

INSPECTION,

of documents. *See* DISCOVERY.

of premises may be ordered, 207.

INSPECTOR OF PRISONS AND PUBLIC CHARITIES,

ex officio committee of certain lunatics, 55.

INSPECTOR OF TITLES, 11.**INTERLOCUTORY JUDGMENT,**

default of appearance, 72, entry of, 73.

defence in action for unliquidated damages, 114.

for, debt, or liquidated demand, 112.

to recover land, 113.

INTERLOCUTORY ORDER,

when not appealable to Court of Appeal, 4.

INTERLINEATIONS,

in affidavits to be authenticated, 171.

ISSUE,

may be directed when pleadings defective, 86.
to be settled by Judge, 86.

JOINDER OF CAUSES OF ACTION, 37-40. *See* ACTION.

causes which may not be joined, 39-40.
cause improperly joined, may be struck out, 38.
leave for, when necessary, 38.
how obtained, 40.
separate trials may be ordered, 38.

JOINDER OF PARTIES. *See* PARTIES TO ACTIONS—CHANGE OF INTEREST.

JOINT CLAIMS,

may be joined with separate, in same action, 38.
by, or against, husband and wife, 38.

JOINT STOCK COMPANY,

service of writ on, 55.
examination of officers of, for discovery. *See* DISCOVERY.
examination of officers of, as to debts, due to debtor company, &c.
See ATTACHMENT OF DEBTS.

JUDGE,

appeal from, to Court of Appeal, 34.
Divisional Court, 7.
not to reserve case for Divisional Court, 122.
trial before, 118.

JUDGE IN CHAMBERS,

appeals from, 218.
to, 218.
motions to be made to, 212.
motions before Masters in Chambers, may be adjourned before, 215.

JUDGE OF COUNTY COURT,

administration, motion for, 216.
appeals from, 218.
jurisdiction of in Chambers, 214.
matters excluded from jurisdiction of, 214.
may adjourn motion before Judge, 215.
may take examination of judgment debtor, 153.
motions to, how made, 214.
partition, motion for, 217.

JUDGMENT. *See* MOTION FOR JUDGMENT.

after trial, 138.
amendment of, 143, 252, 253.
certificate of Judge for entry of, 125.
officer for entry of, 125.
date of, 142.
default of appearance, final, 69-73.
may be entered for part of claim, or against some of defendants, 69-71.
interlocutory, may be entered for part of claim, or against some of defendants, 72-73.
default of defence, final, 113.
motion for, 115.
mortgage suits, 113.
interlocutory, 112, 113, 114.
default, by, may be set aside on motion, 116, 123.
direction to enter, 125.
directions to be implied in, though not expressed, 142.

JUDGMENT—(Continued),

- entry of, 125, 126, 138-141.
 - in default of appearance, 70, 71.
- how entered, 139-141.
- in outer counties, to be entered at Toronto, 75.
- leave to sign, application for, when writ specially indorsed, 78-80.
- mistakes in, how corrected, 143.
- motion for, in default of appearance, 76-77.
 - when necessary, 76.
 - in default of defence, 115.
- motion to set aside, when obtained on the merits, 7, 129.
- procipe*, in mortgage suits, how obtained, 73-75.
- setting aside, motion for, 7, 129.
- terms of to be settled by Judgment Clerk, 126.
- unanimous, when appealable, 4.
- when it may be entered, 138.
- where it may be entered, 138-139.

JUDGMENT CLERK,

- senior, 10.
- junior, 11.
 - duties of, 10-11.
- to settle terms of judgment, 126.

JUDGMENT DEBTOR,

- attendance for examination, how enforced, 153.
- committal of, 154.
- concealment, or fraudulent disposition of assets by, 154.
- costs of examination of, 155.
- examination of, how made, 152.
- married woman, liable to committal, 154.
- non attendance for examination, 154.
- officers of debtor corporation, may be examined, 152.
- order to commit must be absolute, 154.
- unsatisfactory answers of, 154.

JURISDICTION,

- actions against persons out of, 65-66.
- appearance time for, where writ served out of, 45.
- former procedure and practice in certain cases retained, 5.
- of Court of appeal, 2-4.
 - High Court of Justice, 5.
 - Master in Chambers, 210-211.
 - County Court Judges, 214.
 - Local Masters, 15, 214.
- service of writ out of, 56.
 - allowance of, 65.

JURY,

- actions tried by, motion for new trial in, 6.
- costs, where action tried by, 174.
- may be directed to give verdict subject to facts being proved, 122.
- notice for trial by, 97, 106.
 - service of, 97, 106.

LAND. See ACTION FOR RECOVERY OF LAND,**LANDLORD,**

- appearance by, 60.
 - notice of, where necessary, 62.

LEAVE TO APPEAL,

- to Court of Appeal when necessary, 4.

- LEAVE TO DEFEND.**
where writ especially indorsed, when granted, 78-80.
- LEAVE TO JOIN DISTINCT CAUSES OF ACTION,**
when necessary, 39.
how obtained, 40.
- LEAVE TO MOVE.**
when necessary, 210.
unnecessary, 202.
how obtained, 201.
- LIMITING DEFENCE,**
in actions for recovery of money, 60.
land, 61.
notice, may be filed with appearance, 60-61.
effect of, 61.
- LOCAL MASTERS, 14.**
administration, motion for, 216.
appeals from, 218-219.
jurisdiction of, in Chambers, 15, 214.
matters excluded from jurisdiction of, 214.
may adjourn motions before Judge, 215.
may make examination of judgment debtor, 153.
motions to, how made, 214.
names of, 20-21.
officers of Supreme Court, 14.
partition, motion for, 217.
powers of, under judgment directing a sale, 143.
- LOCAL OFFICERS,**
of High Court, 14, 18, 20, 21.
of Supreme Court, 14.
- LOCAL REGISTRARS, 16.**
books to be kept by, 22, 23.
cause list, how prepared, 120.
duty of, at trial, 124.
entry of action for trial, with, 119.
names of, 20, 21.
powers of, 16, 17.
- LONG VACATION.**
no amendment of pleading in, 252.
not reckoned in time for amending, 251.
- LUNATIC,**
actions by, 31.
actions against, 35.
service of writ, on, how effected, 55.
guardian *ad litem* to, how appointed, 63, 64.
who to be appointed 65.
party to special case, 134.
truth of facts stated in special case to be proved, 134.
- MALICE.**
how pleaded, 85.
- MANDAMUS.**
motion for, 207.
- MARRIAGE OF PARTIES, 255-6.**
proceedings on. *See* CHANGE OF INTEREST.

MARRIED WOMAN,

- action by, 27.
- staying, where no next friend named, 30.
- action against, 34.
- defence by, 35.
- may sue alone respecting separate estate, &c., 27.
- next friend, when necessary, 27, 30.
 - who may be, 30.
- separate estate of, what is, 28, 29.
- service of writ on, 54.
- pauper, may sue without next friend by leave, 30.

MASTER. See LOCAL MASTER.**MASTER IN ORDINARY OF SUPREME COURT, 8.**

- may take the examination of judgment debtor, 153.
- an Official Referee, 13.
- powers of, under judgment directing a sale, 143.

MASTER IN CHAMBERS, 8, 210, 211.

- jurisdiction of, 210, 211.
 - matters excluded from, 210, 211.
- appeal from, 218.
- Official Referee, may sit for, 8, 272.
- orders made by, to bear name of, 213.

MISDIRECTION.

- no ground for new trial, when, 128.

MISJOINDER OF PARTIES.

- not to defeat action, 24.

MONTH,

- means calendar month, 268.

MORTGAGE SUITS.

- default of appearance, judgment on, 73-75.
- dispute note filed, judgment how obtained, 81.
- indorsement of writ, in, when account to be taken by Registrar, 45.
- judgment on præcipe, after defence, when, 104.
 - in, form of, 143.
 - effect of, 143.

MOTIONS. See MOTION FOR JUDGMENT,—MOTION FOR NEW TRIAL.**IN COURT, how made, 200.**

- accounts for, when, 207.
- affidavits on, 203-204.
 - cross-examination on, 204, 205.
- delivery of property, for, 209.
- detention of property, for, 208.
- enquiries for, 207.
- evidence on, 203.
 - affidavits in support, 203.
 - in answer, or reply, 204.
 - cross-examination on, 204-205.
 - notice of, 205.
 - oral, how obtained in Chancery Division, 205-206.
 - Queen's Bench and Common Pleas Divisions, 207.
- hearing of, 206.
- injunction, for, 207.
- inspection of property, for, 208.
- mandamus, for, 207.
- non-appearance on, 207.

MOTIONS—(Continued),

- notice of, 200.
 - leave to serve, 201.
 - when unnecessary, 202.
 - for injunction, 202.
 - when to be made returnable, 202.
 - service of, 203.
- perishable goods, for sale of, 208.
- preservation of property, for, 208.
- receiver, for, 207.
- transfer of, from one division to another, 266.
- IN CHAMBERS, how made, 209, 212.
 - to Judge, 212.
 - to *Master in Chambers*, 210-211.
 - to be made on notice, 212.
 - notice of, form of, 213.
 - service of, 213.
 - leave to serve, 212.
- evidence on, 213,
 - affidavits, filing, 213.
- to County Court Judge, 213.
- to *Local Master*, 213.
 - jurisdiction of C. C. Judge, and L. M., to hear, 214.
 - to be made on summons, 214.
- adjournment of, before Judge, 215.
- administration for, to whom made, 216.
 - by whom made, 216.
 - how made, 216.
- form of judgment, 216.
- partition, or sale, for, to whom made, 217.
 - by whom made, 217.
 - how made, 217.

MOTION FOR JUDGMENT,

- admissions in pleadings, &c., on, 129.
- after appearance where writ specially indorsed, 78-80.
- after delivery of defence, 104, 105.
- after trial of issues of fact, 130.
- any motion may be turned into, 131.
- default of appearance, on, when necessary 76-77.
- default of defence, on, 115.
- evidence, documentary, 129.
 - by affidavit, 129.
 - necessary only against infants, 129.
- hearing of, 132.
- how made, 131.
- judgment on motion, 132.
- leave of Court, by, 129.
 - when granted before defence, 131.
- mortgage suits, 104.
- notice of, 132.
- redemption suits, 104.
- sitting of Court for hearing, of, 132.
- special cases, 132-135.
- when to be made, 129, 132.
- where some questions have been tried, 131.
- within a year, from right to move, 132.

MOTION FOR NEW TRIAL. See NEW TRIAL.

- action tried by Judge, 126.
- by jury, 126-128.

MOTION FOR NEW TRIAL—(*Continued*),

argument of motion, 128.
 judgment on motion, 128.
 setting down for argument, 128.

NAMES OF MEMBERS OF FIRM.

how obtained, 32, 221.

NAMES OF OFFICERS,

officers at Toronto, 18-19.
 Local Officers, 20-21.

NEW ASSIGNMENT,

abolished, 88
 facts formerly raised by, to be raised by amendment, 88.

NEW TRIAL,

motion for, 6.
 when action tried by a Judge, 126.
 jury, 126, 128.
 time for, 126-127.
 order *nisi* for, how obtained, 127.
 service of, 127.
 as to part of causes of action, 128.
 costs, 128.

NEXT FRIEND,

of infant, 27.
 need not be solvent, 27.
 of married woman, when requisite, 30.
 must be solvent, 30.
 security for costs where not, 30.
 staying action, when none named, 30.
 changing, 30.

NOTICE,

of motion, 202.
 when to be made returnable, 202.
 service of, 203.
 of trial, 118.
 cannot be countermanded, 118.
 of writ of summons to be served on foreigner, 56.
 to admit, 168.
 to produce documents, 244. *See* DISCOVERY.
 to third party liable to contribution, 96, 101.
 effect of, 101.
 service of, 101-102.
 appearance on, 102.

NOT GUILTY BY STATUTE,

how pleaded, 90.
 what defences available under, 96-91.

NUMBERS,

in pleadings, to be in figures, 85.

OFFICERS OF THE COURT, 8-21.

OFFICIAL GUARDIAN, 12, 19.

service of writ on, 54, 55.

OFFICIAL REFEREES, 13, 15, 20-21.

duties of, 13.
 trials before, 135-137.
 actions may be referred to, 135.
 questions in, may be referred to, 135.
 proceedings before, *de die in diem*, 137.
 tribunal of, not a public Court, 137.
 cannot commit, 137.
 may take examination of judgment debtor. 153.

ORDER,

not appealable, 4, 7.
 interlocutory, when no appeal from, 7.
 issued by local officers requiring entry, to be entered in Toronto, 18.

ORDER NISI,

for new trial, 127.
 service of, 127.

ORDER IN COUNCIL,

regulating offices, 272-3.

**PARTIES TO ACTIONS, 24, 40. See CHANGE OF INTEREST—AMEND-
MENT.**

adding, 248, 9.
 change of. *See* CHANGE OF INTEREST.
 misjoinder of, not to defeat action, 24.
 representative character of, to be indorsed on writ, 47.
 striking out, 248-9.

PLAINTIFFS, 25-33.

administrators, 25.
 assignee of *chase* in action, 27.
 attorney-general, 32, 33.
cestui que trust, 26.
 class suits, 31.
 executors, 25.
 firm, may sue in firm name, 32.
 heir at law, 26.
 husband of married woman, 30.
 in ants, 27.
 in actions for protection of property, 26.
 jointly and severally entitled, 25.
 legatee, 26.
 lunatics, 31.
 married women, 27.
 when next friend necessary, 27, 30.
 numerous, one may sue for all, 31.
 partners, may sue in name of firm, 32.
 residuary legatee, 26.
 residuary devisee, 26,
 trustees, 25.

DEFENDANTS, 33-37.

administrators, 35.
 executors, 35.
 firm, 35.
 infants, 33.
 jointly and severally liable, 33.
 lunatics, 35.
 mortgage suits, in, 36, 37.
 partners; 35.
 trustees, 35.

PARTITION OR SALE,

judgment for, on *precipe*, 75.
 motion for, how made, 211, 217.
 by whom, 217.
 to whom, 211, 217.

PARTNERS,

execution against, 150-151.
 leave to issue, 151.
 names, disclosure of, 32, 221.

PARTNERS—(Continued),

service of writ on, 55.
suing in name of firm, 32.
sued in name of firm, appearance by, 59.

PAYMENT INTO COURT,

how made, 264.
under plea of payment, 99.
 plaintiff may accept, 99.
 and tax costs, 99.
by garnishee, 159.

PAYMENT OUT OF COURT.

how to be made, 265.
 order of Judge requisite, 211.
 except where paid in under plea of payment, 265.
Master in Chambers, C. C. Judges, and Local Masters, cannot order,
 211.

PATENT,

question as to validity appealable without leave, 3.

PENDING BUSINESS,

in Chancery Division, 271.
 Queen's Bench, and Common Pleas, Divisions, 270.

PERISHABLE PROPERTY,

motion for sale of, 208.

PETITION,

may be filed when necessary, 202, 212.
tender of \$5 costs, to formal respondent, 178.

PLEADINGS,

admissions in, how to be made, 88.
amendment of, 248-252. *See* AMENDMENT.
close of 86-87.
copy to be left for Judge at trial, 120.
counter claim. *See* COUNTER-CLAIM.
date, of, 84.
dates in, to be in figures, 85.
default by plaintiff, consequence of, 115.
 defendant, consequence of, 112-115.
 third party added, 115-116.
denial of contract, effect of, 86.
demurrer, 107, 111.
documents, how to be pleaded, 85.
facts, to be stated, 85.
 presumed, need not be pleaded, 85.
 inconsistent with previous pleading, how pleaded, 89.
filing 92.
figures to be used in, for dates, sums, and numbers, 85.
fraud, how pleaded, 85.
implied contract, how pleaded, 85.
intention, how pleaded, 85.
malice, how pleaded, 85.
nature of, 84.
notice, how pleaded, 85.
numbers in, to be in figures, 85.
printed, or written, may be, 84.
representative character, presumed, unless denied, 86.
reply. *See* REPLY.

PLEADINGS—(Continued).

- rules of, applicable to all pleadings, 84-87.
 - statements of claim, 87, 88.
 - defence, and subsequent pleadings, 88, 91
- service of, 92.
 - time for, 92.
- set-off. *See* COUNTER-CLAIM.
- silence of, no admission, 88.
 - exceptions to rule, 88.
- statement of claim. *See* STATEMENT OF CLAIM.
 - defence. *See* STATEMENT OF DEFENCE—COUNTER-CLAIM.
- style of cause, 85.
- sums in, to be in figures, 85.
- where to be filed, 92.

PLEADING AND DEMURRING. *See* DEMURRER.**PLAINTIFF. *See* PARTIES TO ACTIONS.**

- residence and occupation, how obtained, 220.

POSSESSION,

- writ of, 149.
- effect of, 149.

PRACTICE,

- former, when to be followed, 5.

PRÆCIPUE,

- judgment in mortgage suits, on, how obtained, 73-75.

PRESIDENTS OF DIVISIONS. 2.

- transfer of actions by, 266-267.
- motions by 266-267.

PRESIDENT OF HIGH COURT,

- who is, 2.
- writs to be tested in name of, 45, 146.

PRINTING,

- pleadings may be in, 84.

PRIVILEGED DOCUMENTS. *See* DISCOVERY.**PROCEEDINGS,**

- in default of appearance, 63-77.
- after appearance, 78.
- in default of pleading, 112.
- to final judgment, to be carried on in office whence writ issued, 92.

PROCEDURE,

- former, in what cases to be retained, 5.

PRODUCTION OF DOCUMENTS. *See* DISCOVERY.

- by judgment debtor, 153.

PROPERTY,

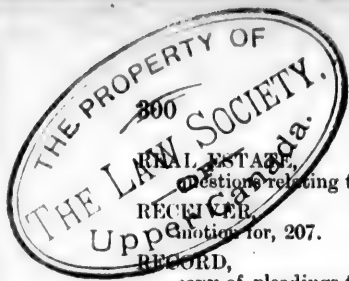
- delivery of, motion for, 208.
- detention of, " 208.
- inspection of, " 208.
- perishable, may be sold, 208.
- preservation of, motion for, 208.

PROTECTION OF PROPERTY,

- motion for, 207.

QUEEN'S BENCH DIVISION, 2.

- President of, 2.
- officers of, 10-19.
- pending business in, 270.



INDEX.

Questions relating to, appealable, without leave, 3.

RECORDER

Motion for, 207.

RECORD,

copy of pleadings to be delivered, as, 120.

indorsement of findings on, 124-125.

delivery of to successful party, 125.

withdrawal of, 123.

RECOVERY OF LAND. *See* EJECTMENT—ACTION FOR RECOVERY OF LAND.

REDEMPTION,

account, how taken, 113.

action for. *See* MORTGAGE SUITS.

default of appearance, judgment, how obtained, 73-75.

defence, judgment, how obtained, 113.

judgment for, on *precipe*, how obtained, 73-75, 113.

notice of taking account, 113.

REFEREE. *See* OFFICIAL REFEREE.

REFEREE OF TITLES, 11.

(Local), 20-21.

REGISTRAR,

duty of, at trial, 124.

of Chancery Division, 10.

assistant " 11.

of Common Pleas Division, 12.

may take examination of judgment debtor, 153.

Official Referee, 13-19.

of Queen's Bench Division, 10.

may take examination of judgment debtor, 153.

Official Referee, 13, 19.

to sit in Chambers, 272.

RELIEF,

to be specifically claimed in statement of claim, 87.

of counter-claim, 89.

general, may be claimed, 87-89.

where prayed, claim not demurrable, if ground for any shown, 87.

RENEWAL OF WRITS,

execution, 147.

summons, 50.

REPLEVIN,

action of, how commenced, 42.

REPLY. *See* PLEADING.

amendment of, *see* AMENDMENT.

defence to counter claim arising after its delivery, 106.

default in delivery, dismissal of action for, 115.

matters pleadable by way of, 106.

service of, 106.

time for filing, 106.

third party, by, 107.

REVIEW OF TAXATION, 183.

appeal from, to Judge, 184.

evidence on, 184.

none to Master in Chambers, 210.

except by consent, 210.

REVISION OF TAXATION, 181-183,

- when compulsory, 181.
- optional, 182.
- fees payable on, 182.
- forwarding bill for, 182.
- execution may issue pending, 182.

REVIVOR, *See* CHANGE OF INTEREST.RULE *NISI*. *See* NEW TRIAL.RULES OF SUPREME COURT. *See* TABLE OF RULES CITED,
additional, 273.

RULES OF HIGH COURT OF JUSTICE, 274.

SALE. *See* MORTGAGE SUITS.

- auction, by, authorized, 143.
- judgment directing, effect of, 143.
- tender, by, authorized, 143.
- perishable property, of, may be ordered, 207,

SATURDAY,

- service on, 269.

SECURITY FOR COSTS,

- bond for, to be made to party, 225.
- surety, 226.
 - solicitor ineligible as, 227.
 - affidavit of justification, when required, 227.
 - execution, when required, 227.
- form of, 227; objection to, *ib.*
- dismissal of action for not giving, 226.
- how given, 226.
- order for, on *precipe*, when, 222.
- how obtained, 223.
- form of, 223.
- discharge of, 226.
- payment into Court, as, 227.
- special application for, when, 223-224.
- grounds for, 224-225.
- costs of former suit not paid, 225.
 - where payable out of estate, 225.
- defendant filing counter-claim, 225.
- ejectment, successive actions of, 225.
- informer, action by, 225.
- plaintiff's address fictitious, 225.
- refusal of, on what grounds, 226.
- property within jurisdiction, 226.

SEPARATE ESTATE,

- actions in respect of, 28, 29, 34, 35.

SEQUESTRATION,

- when it may be issued, 149.

SERVICE,

- of counter-claim an third party, 98.
- notices, 92, 269.
- notice of appearance, 62.
- motion, 203.
 - for judgment, 131.
- to contributory, 101, 102.
- orders, 92, 269.

SERVICE—(Continued),

- of pleadings, 92.
- proceedings, 92, 269.
- summons, 92, 269.
- writ of summons, personal, 53.
 - on solicitor, 52.
 - companies, 56.
 - corporations, 56.
 - firms, 55.
 - infants, 54-55.
 - joint stock companies, 55.
 - lunatics.
 - married women, 54.
 - partners, 55.
- out of jurisdiction, 56.
 - allowance of, 65.
- affidavit of, 57.
- date of, to be indorsed on writ, 57.

SET-OFF. See COUNTER-CLAIM.

- against whom it may be filed, 95.

SOLICITOR, 9.

- swearing in, 19.
- service of writ on, 52.
- undertaking to appear, 52.
 - how enforced, 53.
- plaintiffs', to pay costs of taxation, if costs claimed on writ reduced a sixth, 47.

SOLICITOR AND CLIENT,

- delivery of bill, order for on *præcipe*, 186.
- taxation of costs between 185, 187.
 - order for, how obtained, 185, 186.
 - form of, 186.
 - effect of, 187.

SPECIAL CASE,

- form of, 134.
- inferences may be drawn, 134.
- may be ordered by Court, 133.
- parties under disability, sanction of Court to, necessary, 134.
- questions of law may be tried by, 133.
- stated by consent, 133.
 - agreement as to effect of decision on, 133.
- signature of, 134.
- setting down, 134.
 - leave for, when necessary, 135.
 - affidavit to obtain, 135.
- notice of, 135.
 - service of, 135.
- sitting of Court for hearing, 135.
- truth of facts alleged in, to be proved, when, 134.

SPECIAL EXAMINERS, 12, 17, 19, 20, 21.

- may take examination of judgment debtor, 153.

SPECIAL INDORSEMENT.

- leave to sign judgment, 78-80.
- omitted, subsequent proceedings in default of appearance, 70.

STATEMENT OF CLAIM.

- amendment of. *See* AMENDMENT.
- causes of action which may be joined, 37-38.
not be joined, 39-40.
- consequence of not filing, 82.
- costs of, when delivered unnecessarily, 179.
- defence arising after delivery of defence, 91.
- enlarging time for filing, 82, 269.
- filing, 92.
- form of, 94.
- general relief, claim for, effect of, 87.
- joinder of different causes of action, 87-88.
- non-delivery of, motion to dismiss action for, 115.
- place of trial, to be stated in, 87.
- relief to be specifically claimed, 87.
general, claim for, effect of, 87.
- rules applicable to, 87.
- service of, 93.
- time for filing, 82.
- when it may be delivered, 82, 93.
- writ, copy of, to be filed where none delivered, 94.

STATEMENT OF DEFENCE,

- abatement, plea in, abolished, 89.
- action for recovery of land, in, 89.
- admissions in, how made, 88.
- amendment of. *See* AMENDMENT.
- counter-claim, 87.
what claims may be set up by, 97-98.
- relief claimed under, 98.
- striking out, 98.
- disallowance of, 95.
- third party, affected by, 98.
service of, 98.
appearance by, 99.
- defence arising after action, 91.
delivery of statement of defence, 91.
- distinct grounds of defence, to be stated separately, 89.
- dispute note, 100.
defence provable under, 100.
- facts and grounds of defence, to be set up, 88.
- filing and service of, 92, 96, 97.
- form of, 97.
- jury notice, 97.
- not guilty by statute, how pleaded, 90.
- notice to third party liable to contribution, 101.
service on third party, 101-102, effect of, *Ib.*
Court may direct, 101-102.
appearance by third party, 102.
- payment into Court, 99.
plaintiff may accept, 99.
tax costs, 99.
- proceedings after delivery of, 103-107.
in mortgage suits, 104.
motion for judgment, 105.
discontinuance, 105.
confession of defence, 105.
reply, 105.
- service of, 92, 96-97.
by posting up, 97.
- set-off, 97 (*see* COUNTER-CLAIM).

reduced a

4.

3.

70.

STATEMENT OF DEFENCE—(*Continued*),

silence of, as to allegations in statement of claim, 88.
time for delivery may be extended, 96, 269.
when to be delivered, 96.
withdrawal of, 100.

STAYING PROCEEDINGS,

when writ issued without authority, 220.
without next friend, 30.
when next friend insolvent, 30.

STRIKING OUT PARTIES. *See* AMENDMENT.

STYLE OF CAUSE,

in pleadings, 85.
writ of summons, 44.
action against a firm, not changed after appearance by partners, 60.

SUMMONS. *See* WRIT OF SUMMONS.

applications in Chambers to County Court Judge to be on, 214.
Local Masters to be on, 214.

how issued, 215.
service of, 92, 269.

SUPREME COURT,

Accountant of, 9.
constitution of, 1.
local officers of, 14.
Masters of, 8, 14.
officers of, at Toronto, 8-10.
Rules of, cited, xv.
additional, 274.
Taxing Officers, 9.

TARIFF.

of solicitors' fees, 188.

TAXATION. *See* Costs.

attendance on, 177.
by Local Master, 177.
Deputy Registrar, 177.
Deputy Clerk of Crown, 177.
Local Registrar, 177.
defendant paying costs pursuant to indorsement on writ, may have, 47.
practice as to, 177-8.
between, solicitor and client, order for, 185-187.
unnecessary proceedings, 178-179.
review of, 183-184.
how obtained, 183-184.
appeal to Judge from, 184.
evidence on, 184.
revision of, 181-183.
when compulsory, 181.
optional, 182.

TAXING OFFICERS, 9. *See* TAXATION.

powers of, 177.
to tax costs in Toronto for all Divisions, 177.
to revise taxations by Local Officers, 177.

THIRD PARTY,

counter claim against, 95, 98.
when it may be filed, 95.
service of, 98.
appearance by, to, 89.
reply by, to, 107.

THIRD PARTY—(Continued),

- notice to, as contributory, &c., 96, 101.
- effect of, 101.
- Court may direct, 101, 102.
- appearance thereon, 102, defence by, 103.
- trial of action where given, 103.

TIME.

- computation of, 268.
- enlarging and abridging, 269.
- for appearance, 44, 45.
- for statement of claim, 93.
- for defence, 96.
- for reply, 106.
- for demurrer, 108.
- for amendment of pleadings, 250, 251.
- for moving for new trial, 126-127.

TRANSFER.

- of actions, 266.
- of motions, from one Division to another, 266-7.

TRANSMISSION OF INTEREST. See CHANGE OF INTEREST.**TRIAL,**

- actions to be tried, as formerly, 117.
- adjournment, terms of, 124.
- affidavits at, *See AFFIDAVITS—EVIDENCE.*
- before Judge, with, or without a jury, 118.
- Referees, 135-137.
- arbitrators, 137.
- cause list, how prepared, 120.
- costs, applications respecting, at, 174.
- entry for, 118-119.
- where to be made, 120.
- facts omitted at, may be subsequently proved, 122.
- modes of, 117-118.
- notice of, 118.
- when to be given, 118.
- service of, 118.
- cannot be countermanded, 118.
- non-appearance of defendant at, 122.
- plaintiff, at, 123.
- nonsuit at, equivalent to judgment, 124.
- place of, may be chosen by plaintiff, 87.
- except in ejectment, 87.
- change of, 87.
- proceedings at, 121.
- right to begin, 121.
- separate, may be ordered of distinct causes of action, 38, 117.
- undefended actions, 120.
- when notice served on third party, 103.

UNDEFENDED ACTION,

- how to be tried, 120.

VACATION—LONG.

- amendment of pleadings not to be made in, 251.
- how spent by author, *passim.*
- not to be reckoned in time for making amendment, 251.

VENUE,

- to be stated in statement of claim, 87.
- not local, except in actions of ejectment, 87.
- change of, 87.

VENDITIONI EXPONAS. See EXECUTION.

VERDICT,

- obtained by default, may be set aside on motion, 123.

VICE-CHANCELLORS,

- title of, abolished, 2.

WILFUL NEGLECT AND DEFAULT.

- enquiry as to, when made, 217.

WITHDRAWAL,

- of claim, 123.
- defence, 100.
- record, 123.

WITNESSES

- attendance of, may be dispensed with, when, 131.
- may be subpoenaed, 120.
- evidence of, for trial may, by leave, be taken before Examiner, 121.
- on motion, 205.
- fees of, 197.

WRIT OF EXECUTION. See EXECUTION.

WRIT OF POSSESSION, 149.

- effect of, 149.

WRIT OF SUMMONS, 41-57.

- actions to be commenced by, 41.
- allowance of service of, out of jurisdiction, 65.
- amendment of, 51.
- by whom issued, 43.
- concurrent, 49.
- copy of, may be filed when writ issued 48.
 - must be filed, if statement of claim dispensed with, 81.
 - consequence of not filing, 82.
- date, and teste, of, 45.
- duration of, 50.
- form of, 44.
- filing copy, 48.
- how issued, 44.
- indorsement of, 45.
 - special, 46.
 - character in which plaintiff sues, 47.
 - name of party issuing, 47.
 - for *lis pendens*, 44, 49.
- issue of writ, 48.
- notice to be served in lieu of, 56.
- renewal of, 50.
- service of, on solicitor, 52.
 - defendant, 53.
- substituted, 54.

WRIT OF SUMMONS—(*Continued.*)

service on married women, 54.
 infants, 54-55.
 lunatics, 55.
 partners, 55.
 firm, 55.
 corporation aggregate, 56.
 companies, 56.
 joint stock companies, 56.
setting aside, 51.
time for appearance to, 44-45.
where issued, 43.

niner, 121.

81.